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Making Domestic Violence Private Again: Referral Authority and Rights Rollback in *Matter of A-B-*

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MAKING DOMESTIC VIOLENCE PRIVATE AGAIN: REFERRAL AUTHORITY AND RIGHTS ROLLBACK IN *MATTER OF A-B-*

Abstract: In the 1960s and 1970s, the women’s movement brought the issue of domestic violence to the forefront of American consciousness. In the decades to follow, the United States expressed a commitment to protecting victims of domestic violence through legislation and reform that reframed the issue as a matter of state concern, rather than merely a private dispute. U.S. asylum law, in contrast, has failed to express a parallel commitment to protecting domestic violence victims. In 2018, in *Matter of A-B-*, then-acting Attorney General Jeff Sessions invoked his referral authority to overturn precedent from 2014 that recognized domestic violence as an asylum-worthy form of persecution. In the process, A.G. Sessions characterized domestic violence as a private injury, rather than a public harm. This Note examines the scope of that decision and argues that the current lack of substantive asylum protections, combined with the Attorney General’s unrestricted referral authority, leaves domestic violence victims seeking asylum particularly vulnerable. Further, this Note proposes procedural reform to curb the Attorney General’s referral authority and promote a more fair and participatory system for asylum adjudication.

INTRODUCTION

In his 1972 film, *The Godfather*, Francis Ford Coppola portrays a horrific scene of domestic violence.¹ After Connie Corleone presumably discovers her husband is having an affair, she erupts emotionally and physically, smashing nearby objects that bind her to domesticity: china plates, eggs, and bread.² In response, her husband unleashes a flow of verbal and physical abuse as he stalks his pregnant wife around the house, striking her repeatedly with his belt.³ In the scene’s violent culmination, Connie’s husband corners her in the bathroom and shuts the door on the public viewer, effectively creating a private, unseen space in which the viewer can only imagine the abuse will mercilessly continue.⁴

Around the same time that Coppola’s blockbuster film brought Connie’s domestic abuse to public audiences—while also shielding them from the worst of the abuse—the United States experienced a dramatic shift in both its social

¹ THE GODFATHER (Paramount Pictures 1972).

² *Id.*

³ *Id.*

⁴ *Id.* Although Connie and her husband disappear behind the bathroom door, the viewer can still hear Connie’s cries and the relentless sound of belt against body. *Id.*

and legal conception of domestic violence.⁵ In the wake of the women's movement in the 1960s and 1970s, state and federal legislators enacted a series of comprehensive laws to protect victims of domestic violence in the United States.⁶ This legislation, along with similar laws enacted in the decades to follow, reflected a national recognition that the state has a role in protecting victims, who are overwhelmingly female, from violence in the domestic realm.⁷

In sharp contrast, U.S. asylum law has been reluctant to implement substantive legal protections for domestic violence victims seeking asylum.⁸ Alt-

⁵ *Id.*; see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, in *THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN* 165, 166 (Karen J. Maschke ed., 1997) (describing the interactive relationship between cultural and societal perceptions of domestic violence and the substantive law in place to protect victims); Elizabeth M. Schneider, *The Violence of Privacy*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 36, 40–41 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (explaining that in the United States, police and courts have historically relegated domestic violence to the private sphere, deeming the issue not serious or criminal enough to merit intervention). Historically, the division between public and private spheres has influenced the construction of gender roles, with women occupying the private sphere and men occupying the public. Schneider, *supra*, at 37–38; see also Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 *WOMEN'S RTS. L. REP.* 151, 153 (1992) (explaining that, under the separate spheres theory, the husband acted as the public face of the couple and the breadwinner, and the wife occupied the private world of the family). The battered women's movement drove policy and legislative changes to re-cast the issue of domestic violence as a public, rather than a private concern. Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 *LAW & ETHICS HUM. RTS.* 1, 9–11 (2013).

⁶ See Rabin, *supra* note 5, at 7. For example, in the 1970s, states began to enact laws enabling women to obtain civil protective orders, preventing perpetrators of domestic violence from further abusing victims. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *WIS. L. REV.* 1657, 1667. By the mid-1990s, all fifty states had introduced civil protection order statutes. *Id.*

⁷ Sack, *supra* note 6, at 1667; see ELIZABETH M. SCHNEIDER ET AL., *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 8 (3d ed. 2013) (noting that variations in the definition of “domestic violence” account in part for a lack of generally accepted statistics regarding the prevalence of domestic violence). Statistics consistently reveal that women are far more likely to be victims of domestic violence than men. See SCHNEIDER ET AL., *supra*, at 10 (reporting, for example, that 84% of victims of spousal abuse are women). Given an increased societal awareness of the issue since the women's movement, a variety of sources have begun to track statistics about violence against women. *Id.* After the enactment of the Violence Against Women Act (VAWA, or the Act), for example, the Department of Justice's (DOJ) Office on Violence Against Women began to gather statistics from federal, state, and private sources. *Id.* In 1994, VAWA became the first major federal legislation dedicated to protecting women against domestic violence and provided both civil and criminal causes of action. *Id.* at 1, 24; see also Joe Biden, *20 Years of Change: Joe Biden on the Violence Against Women Act*, *TIME* (Sept. 10, 2014), <http://time.com/3319325/joe-biden-violence-against-women/> [<https://perma.cc/46R8-GFR7>] (commemorating the twentieth anniversary of VAWA and characterizing the Act as a recognition of the basic right of women in America to “be free from violence and free from fear”).

⁸ T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq and Somalia*, 24 *GEO. IMMIGR. L.J.* 189, 198 (2010) (explaining that U.S. asylum law does not officially recognize gender-related claims, including claims of domestic violence).

though the Board of Immigration Appeals (BIA, or the Board) has recognized domestic violence as a ground for asylum, it has done so only narrowly, and in several cases protective precedent has been quickly overturned or undermined.⁹ This dearth of protection, combined with the Attorney General's unfettered ability to refer immigration cases to himself, leaves domestic violence victims seeking asylum at risk.¹⁰

This Note explores the implications of Jeff Sessions' 2018 decision in *Matter of A-B-* and argues that the decision reveals the inherent danger of the Attorney General's unchecked referral authority in the absence of substantive legal protections for domestic violence victims seeking asylum.¹¹ In response, this Note proposes the introduction of greater procedural protections, including a required notice-and-comment period, to limit the Attorney General's power to effectively legislate human rights issues without input from the legal community.¹² Part I of this Note provides an overview of the development of federal and state laws to protect victims of domestic violence.¹³ It also explores the Attorney General's referral authority over immigration matters.¹⁴ Further, it discusses the dearth of parallel immigration laws protecting domestic violence victims seeking asylum and provides a brief overview of the holding in *A-B-*.¹⁵ Part II explores the implications of *A-B-* for domestic violence victims seeking asylum in the United States.¹⁶ Finally, Part III proposes the introduction of

⁹ See, e.g., *Matter of Kasinga*, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996) (holding narrowly that young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice are eligible for asylum); *In re R-A-*, 22 I. & N. Dec. 906, 906, 917, 919 (B.I.A. 1999), *vacated by Att'y Gen.* Jan. 19, 2001, *remanded* 23 I. & N. Dec. 694 (B.I.A. 2005), *stay lifted* 24 I. & N. Dec. 629 (B.I.A. 2008) (rejecting asylum eligibility for "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" but vacated just two years later by the Attorney General). See generally Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107 (2013) (providing a thorough overview of outcomes of asylum claims based on domestic violence between 1994 and 2012 and explaining that successful applicants typically narrowed the basis for their persecution by combining factors like nationality, gender, and feminist opinion).

¹⁰ See *infra* notes 63–176 and accompanying text. The Attorney General has the authority to refer cases issued by the Board of Immigration Appeals (BIA, or the Board) to himself for review and adjudication. 8 C.F.R. § 1003.1(h)(1)(i) (2018). I use the male pronoun here because U.S. Attorneys General have been overwhelmingly male. U.S. DEP'T OF JUSTICE, *Attorneys General of the United States*, <https://www.justice.gov/ag/historical-bios> [<https://perma.cc/837W-ME7F>]. Only two of the eighty-five Attorneys General have been female, with Janet Reno acting under President Clinton from 1993 to 2001 and Loretta Lynch acting under President Obama from 2015 to 2017. *Id.*

¹¹ See *infra* notes 18–220 and accompanying text.

¹² See *infra* notes 221–269 and accompanying text.

¹³ See *infra* notes 18–62 and accompanying text.

¹⁴ See *infra* notes 63–102 and accompanying text.

¹⁵ See *infra* notes 103–176 and accompanying text.

¹⁶ See *infra* notes 177–220 and accompanying text.

procedural reform to limit the broad use of the Attorney General's referral authority.¹⁷

I. THE LIMITS OF U.S. LAW IN PROTECTING VICTIMS OF DOMESTIC VIOLENCE

Starting in the 1960s, the United States embarked on a slow journey toward recognizing domestic violence as a public, rather than a private concern.¹⁸ Although the concept of domestic violence in the American psyche continues to waver between these two spheres, the United States has nonetheless signified a firm commitment to protecting victims by enacting widespread legislation and allocating significant law enforcement resources toward tackling this problem.¹⁹ In contrast, this commitment does not extend to individuals seeking asylum in the United States.²⁰ Section A of this Part details the development of U.S. laws protecting domestic violence victims and the social context that gave way to their enactment.²¹ Section B explores the Attorney General's role in the immigration realm and discusses the historical use of the re-

¹⁷ See *infra* notes 221–269 and accompanying text.

¹⁸ See Rabin, *supra* note 5, at 7–8 (explaining the transformation from when the United States viewed domestic violence as a private concern to now, when the broad recognition of the structural nature of domestic violence demands a state response). Of course, the 1960s and 1970s feminist movement had its roots in earlier gender-related rights movements like the suffragette movement of the late-nineteenth and early twentieth century. See Linda Nicholson, *Feminism in "Waves": Useful Metaphor or Not?*, in *FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES* 49, 49 (Carole R. McCann & Seung-Kyung Kim eds., 2013) (explaining that these earlier movements paved the way for the success of feminist activism in the United States in the 1960s); Olivia B. Waxman, *The Surprisingly Complex Link Between Prohibition and Women's Rights*, TIME (Jan. 18, 2019), <http://time.com/5501680/prohibition-history-feminism-suffrage-metoo> [<https://perma.cc/VGS6-EW8C>] (noting that women also played a large role in fueling the movement behind Prohibition, as wives aimed to curb rampant domestic violence that resulted when husbands drank in excess). Because this Note concerns U.S. asylum law, it primarily explores the distinction between "public" and "private" in the American context. It is worth noting, however, that "public" and "private" may carry different meanings outside of the U.S. context. See KIM RUBENSTEIN & KATHARINE G. YOUNG, *THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL* 9 (2016) ("[W]hat is public in one society may well be private in another.").

¹⁹ See Rabin, *supra* note 5, at 14 (explaining that state and federal legislation signifies a dedication to protecting victims of domestic violence). By the 1980s, for example, based on pressure from battered women's advocates, some states enacted changes in arrest policies for domestic violence offenders, broadening the circumstances under which police could investigate and prosecutors could charge crimes of domestic violence. Sack, *supra* note 6, at 1668–69. For example, almost every state enacted legislation enabling officers to make arrests without a warrant in misdemeanor domestic violence cases, and several states passed laws mandating arrest upon a finding of probable cause that a domestic violence incident had occurred. *Id.* at 1668–70.

²⁰ See SARA L. MCKINNON, *GENDERED ASYLUM: RACE AND VIOLENCE IN U.S. LAW AND POLITICS* 4 (2016) (explaining that asylum law does not recognize gender as an established identity category upon which persecution can be based, and that asylum law has allowed "gender to take shape only as a contingent and segregated political category").

²¹ See *infra* notes 24–62 and accompanying text.

ferral authority.²² Finally, Section C discusses the absence of substantive protections for domestic violence victims seeking asylum in the United States and provides an overview of the holding in *A-B*.²³

A. A Brief History of the Evolution of U.S. Federal and State Laws Protecting Victims of Domestic Violence

In a 1981 essay, feminist poet Audre Lorde writes: “anger is loaded with information and energy.”²⁴ Indeed, peaks of publicized and mobilized outrage in the United States—particularly in response to the status of women in society—have historically revealed the untenability of such a status and sparked change.²⁵ The United States experienced such a peak in 2018—deemed by some as the Year of the Woman—as women and men expressed collective anger at rampant sexism and the persistent suppression of women’s voices in society.²⁶ At the 2018 Golden Globes, Oprah Winfrey captured precisely the impetus driving this spike in outrage, noting that, “for too long, women have not been heard or believed”²⁷

²² See *infra* notes 63–102 and accompanying text.

²³ See *infra* notes 103–176 and accompanying text.

²⁴ Audre Lorde, *The Uses of Anger: Women Responding to Racism*, BLACKPAST.ORG (Aug. 12, 2012), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1981-audre-lorde-uses-anger-women-responding-racism/> [https://perma.cc/RT4N-QQ6H]. Audre Lorde originally published this poem in 1981. *Id.*

²⁵ See, e.g., Casey Cep, *The Perils and Possibilities of Anger*, NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-perils-and-possibilities-of-anger> [https://perma.cc/8MDU-3U43] (describing a “recurring figure in American history: the woman whose activism is fueled by anger”).

²⁶ *Id.*; Maya Salam, *2018: Year of the Woman, in 5 Powerful Quotes*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/2018/12/28/us/women-2018-biggest-stories-me-too.html> [https://perma.cc/K3HR-MFTY] (reporting that 2018 has been referred to as the Year of the Woman); see Jessica Bennett, *The ‘Tight Rope’ of Testifying While Female*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/us/politics/christine-blasey-ford-testimony-testifying-while-female.html> [https://perma.cc/W8RN-4HHB] (describing the “gender dynamics, and mental gymnastics” that women must perform to be heard). The year 2018 also marked the height of the #MeToo movement, which began in late 2017 in response to news about Harvey Weinstein’s decades-long abusive behavior toward women and the secret settlements that urged them to keep quiet. See Vasundhara Prasad, Note, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2510–11 (2018) (detailing the evolution and rapid expansion of the global #MeToo movement). Further, the year 2018 saw a second Women’s March—attracting thousands of people—that echoed the 2017 Women’s March protesting President Trump’s policies and rhetoric. *Women’s March 2018: Protesters Take to the Streets for the Second Straight Year*, N.Y. TIMES (Jan. 20, 2018) [hereinafter *Women’s March 2018*], <https://www.nytimes.com/2018/01/20/us/womens-march.html> [https://perma.cc/26CJ-FNQR].

²⁷ Oprah Winfrey, *Golden Globe Awards* (NBC television broadcast Jan. 7, 2018). Unfortunately, this is not a new sentiment, as it also surfaced in the 1991 confirmation of Judge Clarence Thomas. See Julia Jacobs, *Anita Hill’s Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html> [https://perma.cc/23CQ-G69S] (describing lawmakers’ relentless attempts to undermine

Like the Year of the Woman, the women's movement of the 1960s and 1970s signified a breaking point and sparked dramatic change.²⁸ Up to that time, U.S. law and policy had approached domestic violence as a private concern, largely falling outside the scope of state intervention.²⁹ Following a common law tradition, laws and policymakers favored the protection of privacy rights and avoided intruding on family life.³⁰ For example, under the 1962 Model Penal Code, a man could not commit the crime of rape against his wife.³¹ The women's movement sparked a national discussion about the prevalence of spousal abuse and other forms of domestic violence, and it ultimately played an enormous role in forcing legislative change.³²

Anita Hill's testimony about Judge Thomas's repeated harassment by calling her "delusional" and "somewhat unstable").

²⁸ See Rabin, *supra* note 5, at 7–8 (detailing a shift in the U.S. conception of domestic violence as a public, rather than a private concern as a result of feminist activism in the 1960s and 1970s).

²⁹ *Id.*; see LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9 (2012) ("In 1970, if your husband slapped, punched, kicked, or otherwise hurt you in some way, you had little recourse.").

³⁰ See, e.g., Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (tracing the historical roots of the American conception of domestic violence as private back to the common law concept of chastisement, which granted a husband the right to discipline his wife as long as he did not permanently injure her). Even later, into the early nineteenth century, courts upheld this right so long as the husband used a "switch no thicker than his thumb." DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 27 (1989). This metric became known as the "rule of thumb," now a popular expression quite divorced from its violent origins. Kenneth Keniston, *Wife Beating and the Rule of Thumb*, N.Y. TIMES (May 8, 1988), <https://www.nytimes.com/1988/05/08/books/wife-beating-and-the-rule-of-thumb.html>

[<https://perma.cc/P2P8-8BFA>]. The common law doctrine of coverture also supported husbands' ability to punish their wives. See Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE*, *supra* note 5, at 11, 19–21 (explaining that under common law, a woman upon marriage became a *feme covert*, "protected" by the merging of her legal identity with that of her husband). The coverture doctrine and the "rule of thumb" served to normalize violence against women in the home and to reinforce patriarchal family dynamics. *Id.*

³¹ See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375–77 (2000) (explaining that the drafters of the Model Penal Code were in favor of the common law marital rape exemption because they did not want penal law to infringe on family law, and exploring early challenges to this exception dating back to the mid-nineteenth century); Sonya A. Adamo, Note, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 AM. U. INT'L L. REV. 555, 566–67 & n.64 (1989) (noting that the 1962 Model Penal Code immunized married men from prosecution for rape, and that commentators to the Code reasoned that the prior relationship of marriage creates a general presumption of consent).

³² See Rabin, *supra* note 5, at 9–10 (explaining the role of the women's movement in securing changes in state and federal legislation to protect victims of domestic violence); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 626 (1986) (explaining that women's interests historically occupied the private sphere, and that the women's movement secured public recognition of these issues and corresponding legal protection for women). Certainly, factors beyond the women's movement also contributed to the introduction of new legislation. See Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 199, 211 (2008) (describing a tough-on crime mentality that drove legislative advancements and fervent prosecution); Siegel,

The definition of domestic violence, also termed “intimate partner violence,” is far from fixed.³³ Thus, it is worth defining the term as explored in this Note and identifying those most commonly affected.³⁴ According to the U.S. Department of Justice (DOJ), domestic violence encompasses felony or misdemeanor violent crimes committed by an individual in one of several relationships with the victim.³⁵ The perpetrator could be a current or former spouse or intimate partner, could share a child with the victim, or could cohabitate with the victim as a spouse or intimate partner.³⁶ More broadly, domestic violence can be physical, sexual, or psychological in nature, and it can occur between heterosexual and same-sex couples.³⁷ Although men can be victims of domestic violence, women experience it far more often than men.³⁸

In the 1960s and 1970s, feminist advocates brought the issue of domestic violence to the attention of lawmakers and urged them to upend archaic notions of domestic violence as a private, family matter.³⁹ In the following decades, many states introduced both civil and criminal remedies for victims of domestic violence, slowly acknowledging the state’s role in intervening to protect victims.⁴⁰ As legislation progressed through the 1980s and 1990s, the

supra note 30, at 2138–41 (describing the historically racialized nature of domestic violence prosecutions, contextualizing it in a “racially hostile criminal justice system,” and noting that in the nineteenth century, assault law was primarily enforced against immigrants and African-American men).

³³ See SCHNEIDER ET AL., *supra* note 7, at 8 (noting variations in the definition of “domestic violence” that consider factors such as whether or not the victim reports the abuse, whether the abuse was physical or emotional, and how far the definition should extend temporally). The Centers for Disease Control and Prevention refers to domestic violence as “intimate partner violence.” CTRS. FOR DISEASE CONTROL & PREVENTION, *Prevent Domestic Violence in Your Community* (Oct. 3, 2018), <https://www.cdc.gov/features/intimatepartnerviolence/index.html> [<https://perma.cc/XNH9-66SL>].

³⁴ See generally U.S. DEP’T OF JUSTICE, *Domestic Violence* (Jan. 3, 2019), <https://www.justice.gov/ovw/domestic-violence> [<https://perma.cc/MQQ6-NPL7>].

³⁵ *Id.*

³⁶ *Id.*

³⁷ NAT’L INST. OF JUSTICE, *Intimate Partner Violence* (Mar. 30, 2017), <https://www.nij.gov/topics/crime/intimate-partner-violence/Pages/welcome.aspx> [<https://perma.cc/HQW5-QBX9>]. Relatively recent scholarship has also framed gender-based intimate partner violence as a means through which partners establish power hierarchies. SALLY ENGLE MERRY, *GENDER VIOLENCE: A CULTURAL PERSPECTIVE* 3 (2009). For example, a batterer may use violence to demonstrate to his wife or partner that he controls her or to show other men that he is in control. *Id.*

³⁸ See SCHNEIDER ET AL., *supra* note 7, at 10 (reporting that in the United States, one out of ten women experiences rape by an intimate partner during her lifetime, and around 16.9% of women, as compared with 8% of men, experience other forms of sexual violence by an intimate partner in their lifetime); see also Siegel, *supra* note 30, at 2189–91 (discussing a shift after the Supreme Court’s 1976 decision in *Craig v. Boren* to use gender-neutral language in domestic violence statutes).

³⁹ See Kohn, *supra* note 32, at 195–98 (detailing the advent of the recognition of domestic violence as a state concern); see also RHODE, *supra* note 30, at 20 (describing the status of women in the mid-nineteenth century: “[p]aradoxically, the paternalism that justified confining women to the home did not extend to protecting them within it”).

⁴⁰ Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 62 (1992) (explaining that by 1983, forty-three states and the District of Columbia had introduced legislation protecting victims of domestic violence). Before states became involved

United States strengthened arrest policies and prosecutors began to pursue domestic violence cases with vigor.⁴¹

This nationwide, state-level response ultimately led to the passage of the Violence Against Women Act (VAWA) in 1994, which authorized increased funding for domestic violence prosecution and law enforcement, and for non-governmental victim advocacy groups.⁴² VAWA also recognized the unique vulnerability of undocumented immigrant women in the United States, and it provided avenues for domestic violence victims to gain lawful status and seek protection without fear of deportation.⁴³ Renewed several times since its first passage, VAWA also created the U visa in 2000, available to immigrant victims of serious crimes, such as domestic violence, if they agree to aid law enforcement.⁴⁴ By enacting a series of substantive state and federal laws, the United

through legislation, advocates opened shelters and safe houses for battered women, independent of state intervention. Sack, *supra* note 6, at 1666.

⁴¹ See Sack, *supra* note 6, at 1669–74 (explaining that as domestic violence arrests increased, prosecutors instituted more aggressive prosecutorial methods such as mandatory arrests and “no drop” policies, which forced prosecutors to proceed regardless of whether the victim wanted the case to proceed). In some cases, this excessive vigor produced a negative impact on the victim, with law enforcement more focused on prosecutions and jail time than on victims’ wishes. *Id.* at 1678–80 (detailing the critique that women are “revictimized” by aggressive prosecution strategies that strip victims of their ability to decide whether to pursue the case and may increase the risk of violent retaliation); see Zorza, *supra* note 40, at 53 (explaining that proposed legislation, shelters for battered women, and other approaches would have little effect without police enforcement); see also NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 36 (2009) (reporting that routine prosecution of domestic violence cases has become common, although there are still disparities across jurisdictions in the prosecution of these cases).

⁴² Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40,001-40,003, 108 Stat. 1796, 1902–55 (codified as amended in scattered sections of 8, 16, 18, and 42 U.S.C.). One section of the Act, for example, enables the Attorney General to “award grants to increase the availability of civil and criminal legal assistance necessary to provide effective aid to adult and youth victims of domestic violence . . . who are seeking relief in legal matters relating to or arising out of that abuse or violence.” 34 U.S.C. § 20121(a) (2018). *But see* Sack, *supra* note 6, at 1675–76 (detailing criticisms of VAWA on the part of victims and those involved in the battered women’s movement).

⁴³ See Rabin, *supra* note 5, at 10–12 (explaining that VAWA enabled victims of domestic violence to “self-petition” without the approval of the abusive spouse or parent); Leslye E. Orloff & Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 99–101, 105–11 (2002) (describing the evolution of immigration law from historically harming immigrant victims of domestic violence to VAWA, which was structured to restore power to victims). Immigrant women, particularly those who are undocumented, are at increased risk of abuse because of their reliance on their partners for support, and, in the past, to acquire legal status or remain in the United States. See MERRY, *supra* note 37, at 117 (“The threat of deportation is a powerful weapon for an abuser.”).

⁴⁴ Rabin, *supra* note 5, at 11–12. The U visa applies to victims of particular crimes who have experienced physical or mental abuse and are willing to help law enforcement or the government in investigating or prosecuting criminal activity. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Victims of Criminal Activity: U Nonimmigrant Status* (June 12, 2018), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [https://perma.cc/TJG9-LFSL]. The creation of the U visa

States demonstrated its commitment to protecting victims of domestic violence within its borders and to aggressively prosecuting perpetrators.⁴⁵

Despite this legislative commitment, the Supreme Court has grappled with this divide between public and private.⁴⁶ Some scholars argue that the Court has undermined the notion of domestic violence as a public concern worthy of national attention.⁴⁷ Just as the women's movement began to gain strength, the Supreme Court, in 1965, held that the Constitution protects a right to marital privacy and struck down a Connecticut statute prohibiting the use of contraception in *Griswold v. Connecticut*.⁴⁸ Although the case did not deal directly with domestic violence, its rationale that the state should not intervene in the private realm affirmed the sharp distinction between the public and private spheres that has historically left battered women vulnerable.⁴⁹

In the 1970s, as the Supreme Court began to apply a more stringent standard of review to sex discrimination cases, the Court chipped away at the separate spheres ideology that had historically relegated women to the private sphere.⁵⁰ In 1976, in *Craig v. Boren*, the Court elevated the rational basis standard traditionally applied to sex discrimination cases and held that to be constitutional, sex-based classifications must have a substantial relationship to an important governmental purpose.⁵¹ With its decision in *Craig*, the Court

aimed not only to provide greater protection to victims, but also to enhance the ability of law enforcement to investigate and prosecute in domestic violence cases. *Id.*

⁴⁵ See Rabin, *supra* note 5, at 9–10, 13 (noting that both legal and non-legal measures provided by the state to combat domestic violence were essential in enabling women to “make their private suffering public”).

⁴⁶ See, e.g., Deborah Tuerkheimer, *Confrontation and the Re-Privatization of Domestic Violence*, 113 MICH. L. REV. FIRST IMPRESSIONS 32, 35–37, 42 (2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1151&context=mlr_fi [<https://perma.cc/PPC7-XVCN>] (arguing that the Supreme Court's 2011 decision in *Michigan v. Bryant*, in articulating a hierarchy of violence using domestic violence as a marker, undermined decades of successful law reform efforts to overcome the notion of domestic violence as a private concern).

⁴⁷ See *id.*; see also Schneider, *supra* note 5, at 36 (explaining the unintended impact of *Griswold v. Connecticut* on victims of domestic violence).

⁴⁸ 381 U.S. 479, 485–86 (1965); see Schneider, *supra* note 5, at 36–37 (describing the momentum of the battered women's movement and its success in making domestic violence a visible, public issue during the 1970s and 1980s).

⁴⁹ *Griswold*, 381 U.S. at 485–86; see Schneider, *supra* note 5, at 36 (arguing that the notion of marital privacy protected by *Griswold* has traditionally been the primary explanation for why the state will not intervene to help victims of violence in intimate relationships). Indeed, the Court describes marital bedrooms as “sacred precincts” immune from police intervention, suggesting that violence occurring inside such a space may likewise be immune. See *Griswold*, 381 U.S. at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms . . . ? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

⁵⁰ See Williams, *supra* note 5, at 154 (explaining that the Supreme Court began to repudiate the separate spheres ideology as it tackled sex discrimination cases in the 1970s).

⁵¹ 429 U.S. 190, 197–98 (1976). In *Craig*, the Court considered whether an Oklahoma law prohibiting the sale of beer to men under twenty-one and women under eighteen violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 191–92. In holding that the statute did, indeed,

renounced the separate spheres ideology, which was based on the notion that women belong in the home and men belong at work.⁵²

A few decades later, however, the Court took a step backward.⁵³ In its 2000 decision in *United States v. Morrison*, the Court voided the VAWA provision enabling women to sue their abusers in federal court.⁵⁴ In *Morrison*, writing for a five-to-four majority, Justice Rehnquist depicted domestic violence as a local concern, rather than a national concern, arguably underplaying its widespread prevalence and re-framing the issue as a family matter.⁵⁵

In 2005, the Court again faced an opportunity to characterize domestic violence in its joint decision in *Davis v. Washington* and *Hammon v. Indiana*, both cases exploring the testimonial nature of statements to law enforcement in

violate the Equal Protection Clause, the Court adopted a standard of review in sex discrimination cases that fell somewhere between rational basis and strict scrutiny. *See id.* at 197–99 (citing *Reed v. Reed*, 404 U.S. 71 (1971), for the proposition that sex-based statutory classifications require scrutiny under the Equal Protection Clause, and noting that, in the wake of *Reed*, “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’ were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy”). In Equal Protection cases, courts apply three primary standards of review: rational basis review, intermediate scrutiny, and strict scrutiny. Randall R. Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 228 & nn.16–18 (2002) (citing ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 529 (1997)). To overcome rational basis review, the government must prove only that the law is “rationally related” to a “legitimate government purpose.” *Id.* at 228 n.16. Under the intermediate scrutiny standard, the law must be “substantially related” to an “important government purpose.” *Id.* at 228 n.17. Finally, under the strict scrutiny standard, the use of a challenged classification must be “necessary” to advance a “compelling government interest.” *Id.* at 228 n.18.

⁵² *Craig*, 429 U.S. at 197–98; *see Williams*, *supra* note 5, at 154 (arguing that *Craig v. Boren* struck down sex discrimination based on “the old breadwinner-homemaker, master-dependent dichotomy inherent in the separate spheres ideology”).

⁵³ *See United States v. Morrison*, 529 U.S. 598, 625–27 (2000) (voiding a key VAWA provision).

⁵⁴ *Id.* at 601–02, 625–27 (explaining that the VAWA provision at issue, codified at 42 U.S.C. § 13981, provides a civil remedy for victims of violence motivated by gender). In *Morrison*, Justice Rehnquist held that violence against women does not have a substantial effect on interstate commerce and asserted that the Fourteenth Amendment “erects no shield against merely private conduct . . .” *Id.* at 613, 619, 621; *see Rabin*, *supra* note 5, at 54 (describing the effect of *Morrison* as framing domestic violence as a family matter, rather than a problem worthy of national attention).

⁵⁵ *See Morrison*, 529 U.S. at 617–18 (“The Constitution requires a distinction between what is truly national and what is truly local.”). In a vigorous and thorough dissent, Justice Souter cited a litany of statistics demonstrating the prevalence of domestic violence and argued that VAWA responded to precisely the notion that crimes of domestic violence were less serious than other crimes by instituting a national response in the form of federal legislation. *Id.* at 628–36, 654 (Souter, J., dissenting) (“[VAWA] is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence.”). Justice Souter also analogized the systemic nature of domestic violence to that of racial discrimination in the 1960s, and contrasted the Court’s response in *Katzenbach v. McClung* and *Heart of Atlanta Motel, Inc. v. United States* with its response in this case. *Id.* at 635–36. *See Catharine A. MacKinnon, Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 136–37 (2000) (arguing that *Morrison* represents a refusal to permit Congress to rectify violence against women and leaves battered women without recourse).

the wake of incidents of domestic violence.⁵⁶ In *Davis*, the Court reasoned that if the statements were made after the emergency had ended, they were considered testimonial and the Sixth Amendment's Confrontation Clause barred their admission.⁵⁷ In *Hammon*, the Court held that the victim's statements to a police officer after the incident were, indeed, testimonial because the emergency had ended.⁵⁸ Arguably, this determination minimized the ongoing and pervasive nature of domestic violence, which often operates through persistent, escalating coercion that leaves victims living in constant fear.⁵⁹

The Supreme Court has certainly vacillated in its conception of the state's role in intervening in private matters, and indeed in what exactly constitutes a "private matter."⁶⁰ Despite these inconsistencies, the substantive legal protections for domestic violence victims in the United States remain strong and embody an enduring commitment to protecting victims.⁶¹ The same cannot be said in the realm of asylum law, where the concept of domestic violence as a public concern lacks stable footing.⁶²

⁵⁶ *Davis v. Washington*, 547 U.S. 813, 817–21 (2006) (recounting the facts in both the *Davis* and *Hammon* cases). In *Davis*, the Court held that a victim's statements to a 911 operator made while her former boyfriend actively attacked her were made during the course of an ongoing emergency and thus were not testimonial. *Id.* at 817–19, 826–28. In *Hammon*, the Court held that a victim's statements to police after the attacker had left the premises were not made during an ongoing emergency and thus were testimonial. *Id.* at 819–21, 829–30.

⁵⁷ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); *Davis*, 547 U.S. at 822. The Supreme Court has interpreted the Confrontation Clause of the Sixth Amendment to bar the admission in a criminal trial of evidence considered testimonial in nature. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004). In *Davis*, the Court held that to assess whether a statement is testimonial, courts should apply a primary purpose test to distinguish between statements aimed primarily to assist a criminal investigation and those aimed primarily to resolve an ongoing emergency. 547 U.S. at 822. Statements made in the course of an ongoing emergency are not considered testimonial, and so the Confrontation Clause does not bar their admission. *Id.*

⁵⁸ *Davis*, 547 U.S. at 829–30 (determining the testimonial nature of the statements in both *Hammon* and *Davis*).

⁵⁹ *See id.*; Tuerkheimer, *supra* note 46, at 42 (positing that the Court's analyses in *Davis* and *Hammon* derived from the domestic nature of the incidents).

⁶⁰ *See, e.g., Morrison*, 529 U.S. at 617–18 ("[T]he Fourteenth Amendment erects no shield against merely private conduct . . .").

⁶¹ *See Rabin, supra* note 5, at 8, 9–11 (explaining, for example, that today every state has civil protection orders in place and many have criminal sanctions for those who refuse to comply).

⁶² *See* Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46, 47 (2010) (noting that although the Obama Administration may have been more willing to recognize gender-based asylum claims—for example, based on domestic violence—there is an absence of U.S. precedent and jurisprudence to establish the basis for such claims).

B. The Unique and Powerful Impact of the Attorney General's Referral Authority

1. The Attorney General's Role as Head of the Department of Justice

Despite efforts over the last fifty years to engender a national recognition of the prevalence of domestic violence and shift the problem definitively into the public sphere, the United States has yet to securely apply the same logic in asylum law.⁶³ This, however, is not for lack of effort on the part of victims and advocates.⁶⁴ In the realm of immigration, precedential cases typically issue from one of two sources: The BIA or a federal appeals court.⁶⁵ A third source, though rarely invoked, is the Attorney General's referral authority.⁶⁶ As the head of the DOJ, the Attorney General is the chief law enforcement officer of the federal government.⁶⁷ In conjunction with the Department of Homeland Security (DHS), the Attorney General is also responsible for the administration and enforcement of U.S. immigration law.⁶⁸ To aid in this endeavor, the Attorney General has the authority to appoint up to twenty-one BIA judges who act as his delegates.⁶⁹ Although the BIA has the ability to exercise independent

⁶³ See *id.* (lamenting a “dearth of [U.S.] jurisprudence to establish applicable norms” for determining gender-based asylum claims, including claims based on domestic violence).

⁶⁴ See, e.g., *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388–89, 392–95 (B.I.A. 2014) (holding that “married women in Guatemala who are unable to leave their relationship” are eligible for asylum). Four years later, Attorney General Jeff Sessions overruled this case in *Matter of A-B-*, 27 I. & N. Dec. 316, 339–40 (A.G. 2018); Stuart Anderson, *The Sessions Asylum Decision: What Are Its Implications?*, FORBES (June 13, 2018), <https://www.forbes.com/sites/stuartanderson/2018/06/13/the-sessions-asylum-decision-what-are-its-implications/#15098d96776b> [<https://perma.cc/KER2-EBRT>] (explaining that immigration court judges and BIA judges “had utilized their expertise in immigration law over the past decades to arrive at the current state of asylum law” with respect to domestic violence victims seeking asylum).

⁶⁵ The BIA falls under the DOJ. 8 C.F.R. § 1003.1. An adjudicatory body of up to twenty-one attorneys, the BIA has nationwide jurisdiction to hear immigration cases, and its decisions are binding unless overturned by the Attorney General or a federal court. U.S. DEP'T OF JUSTICE, *Board of Immigration Appeals* (Sept. 28, 2018), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/9PU8-28FE>]. For a noncitizen faced with a removal order, initial removal proceedings occur before an administrative immigration court judge. 8 C.F.R. § 1240.1(a). An appeal of this decision can be filed with the BIA, the highest level of administrative review for immigration matters. *Id.* § 1003.1(b). A noncitizen seeking further review must file an appeal in federal court. 8 U.S.C. § 1252(a)(5) (2018).

⁶⁶ 8 C.F.R. § 1003.1(h)(1)(i); Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 901 (2016) (noting that the use of the referral authority over the past fifty years has been rare). The referral authority is also sometimes termed “certification power,” as the Attorney General has the power to “certify” cases to himself. See Gonzales & Glen, *supra*, at 853 (referring to the authority interchangeably as the referral and certification power).

⁶⁷ U.S. DEP'T OF JUSTICE, *Office of the Attorney General*, <https://www.justice.gov/ag/about-office> [<https://perma.cc/YE7S-NXBN>].

⁶⁸ 8 U.S.C. § 1103(a), (g) (2018).

⁶⁹ U.S. DEP'T OF JUSTICE, *Board of Immigration Appeals*, *supra* note 65; see Gonzales & Glen, *supra* note 66, at 849–50 (explaining that since the BIA's formation in 1940, it has operated as the Attorney General's delegate without existing independently in any statute).

judgment in its adjudication of cases, it derives its authority solely from regulations provided by the Attorney General.⁷⁰ Thus, as it stands, the combination of executive branch structure and the current statutory scheme governing immigration law endows the Attorney General with expansive power over immigration law and policy.⁷¹

In line with this broad authority, the Attorney General has the ability to refer cases issued by the BIA to himself for review and adjudication.⁷² The regulations do not specify any limits on the kinds of cases the Attorney General can review, and they do not mandate specific referral procedures; instead, they simply outline the actors that can refer cases to the Attorney General.⁷³ Under 8 C.F.R. § 1003.1(h)(1), the BIA must refer for review all cases if: (1) the Attorney General requests a referral, (2) the BIA Chairman or a BIA majority believes the case should be referred to the Attorney General, or (3) the Secretary of Homeland Security or a designated DHS official refers the case to the Attorney General.⁷⁴

The ability of an agency head—like the Attorney General—to review the decisions of an intermediate appellate tribunal—like the BIA—is by no means novel in administrative law.⁷⁵ Agency head review can be an effective means to ensure agency control over policy and consistency in agency adjudication.⁷⁶ Indeed, as head of the DOJ, the Attorney General straddles the political and adjudicatory realms, playing both a policy-making and judicial role.⁷⁷ As such, he is less burdened by the administrative, procedural requirements binding the BIA and less constrained by political pressure and public visibility than the

⁷⁰ Gonzales & Glen, *supra* note 66, at 850.

⁷¹ See *A-B-*, 27 I. & N. Dec. at 323 (“[T]he extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique.”). Further, for well over a century, the executive branch has enjoyed “plenary power” over immigration matters, enabling it to establish policies and legislation with Congress without substantial intervention from the judicial branch. See Kevin R. Johnson, Chae Chan Ping v. United States: 125 Years of Immigration’s Plenary Power Doctrine, 68 OKLA. L. REV. 58, 58 & n.1 (2015) (explaining that the notion of plenary power as a means of protecting immigration decisions from judicial review was first introduced by the Supreme Court in 1889 in *Chae Chan Ping v. United States* with respect to Chinese exclusion laws). In *Chae Chan Ping*, the Court affirmed the validity of a Congressional act prohibiting certain Chinese laborers from entering the United States, amid a growing tide of prejudice toward Chinese immigrants. See 130 U.S. 581, 595, 609, 611 (1889).

⁷² 8 C.F.R. § 1003.1(h)(1)(i).

⁷³ *Id.* § 1003.1(h)(1).

⁷⁴ *Id.*

⁷⁵ See Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1769–70 (2010) (explaining that agency head review, in itself, is not a controversial practice in administrative law).

⁷⁶ *Id.* at 1770.

⁷⁷ See Gonzales & Glen, *supra* note 66, at 867–68 (noting that the Attorney General’s role is both legal and policy-oriented; he is both the “final arbiter of legal questions and the ultimate decider as to the forms of relief and protection available to aliens under the [Immigration and Nationality Act]”).

President.⁷⁸ The Attorney General's unrestrained referral authority allows him to enact policy reform through the more efficient, definitive route of adjudication in lieu of notice-and-comment rulemaking.⁷⁹

Scholars, however, have noted the benefits of notice-and-comment rulemaking over adjudication for administrative policy making.⁸⁰ Under the Administrative Procedures Act, before issuing a rule, agencies must provide notice of the proposed text and accept public comments.⁸¹ Among the primary benefits of this avenue, rulemaking enables a more participatory process that is fairer to those affected than a rule announced through adjudication of a particular case.⁸² Further, rulemaking fosters political accountability by restraining the ability of unelected agency heads to create legally binding rules.⁸³ Other administrative agencies, such as the Environmental Protection Agency, are required by statute to resolve certain issues through rulemaking, rather than adjudication.⁸⁴ In the realm of immigration, however, there are no such re-

⁷⁸ See Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 132 (2016) (discussing the Attorney General's unique position as not only a political appointee, but also a bureaucrat and adjudicator).

⁷⁹ See Gonzales & Glen, *supra* note 66, at 898 (arguing that Attorney General review via the referral authority is more efficient and certain than regulatory reform). The Administrative Procedure Act articulates two primary routes through which administrative agencies can enact policy: rulemaking and adjudication. 5 U.S.C. §§ 553–554 (2018). Indeed, in practice, most agencies enact substantial policy decisions through either rulemaking or adjudication, although there are other ways to reform policy. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 114 (5th ed. 2012). Under 5 U.S.C. § 553, an agency that engages in rulemaking must provide sufficient notice of the proposed rule to the public and allow an opportunity for the public to comment on the proposed rule. 5 U.S.C. § 553(b)-(c). General notice of a proposed rule is typically published in the Federal Register, and it includes information regarding (1) the time, place, and nature of proceedings, (2) the legal authority supporting the proposal rule, and (3) the proposed rule's terms or a description of the relevant issues. *Id.* § 553(b). Notice-and-comment rulemaking is considered informal rulemaking, as there is no requirement of an oral hearing, as in formal rulemaking. LUBBERS, *supra*, at 251.

⁸⁰ See LUBBERS, *supra* note 79, at 123 (explaining that most contemporary commentators prefer rulemaking over adjudication for agency policy making).

⁸¹ 5 U.S.C. § 553.

⁸² LUBBERS, *supra* note 79, at 123.

⁸³ See Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 822 (2010) (explaining that “[a] sizable literature has noted the benefits of legislative rules, which include establishing a uniform policy, setting policy ex ante, reducing adjudication costs, fostering openness and deliberation, [and] increasing political accountability”).

⁸⁴ See LUBBERS, *supra* note 79, at 115 & n.11 (citing 42 U.S.C. § 6924(a) (2012)) (explaining the impact of the Resource Conservation and Recovery Act of 1976 on the Environmental Protection Agency (EPA)). The Resource Conservation and Recovery Act requires the EPA to “promulgate performance standards for the treatment, storage, or disposal of certain hazardous wastes within 18 months of the statute’s enactment, following opportunity for public hearing and consultation with appropriate federal and state agencies.” *Id.* at 115 n.11. In one instance, the United States Court of Appeals for the D.C. Circuit reprimanded the EPA for attempting to use adjudication in lieu of rulemaking. *Id.*; see *Michigan v. EPA*, 268 F.3d 1075, 1088–89 (D.C. Cir. 2001) (holding that under the Clean Air Act, which required the EPA to follow notice-and-comment rulemaking, the EPA could not use case-by-case adjudication to decide jurisdictional issues over Indian country regarding federal operating permits).

strictions on the Attorney General's ability to eschew this more traditional rulemaking process.⁸⁵

2. The Historical Use of the Referral Authority and Feasible Procedural Limits on This Power

Although the Attorney General possesses a broad and limitless referral authority, Attorneys General in recent history have not invoked this power often.⁸⁶ When an Attorney General does utilize the referral authority, however, controversy almost always arises.⁸⁷ Not only have Attorneys General used the referral authority to impose new rules and overturn seemingly firm BIA precedent, but they have also frequently done so without adequate warning or input from interested parties.⁸⁸ Further, referral decisions tend to produce results that are detrimental to the noncitizen—for example, a denial of relief or a finding that the noncitizen is removable—and applicable to entire classes of immigrants.⁸⁹

In the past, Attorneys General have used the referral authority to resolve questions of law, set policy, or establish new frameworks for future decision making.⁹⁰ Some scholars argue that this referral authority can serve as a pow-

⁸⁵ See Gonzales & Glen, *supra* note 66, at 897 (posing the question: “[I]s Attorney General review an adequate substitute for the more traditional avenue of rulemaking?”); see also *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (holding that if Congress has not specified whether an agency must perform rulemaking or adjudication, the choice between the two procedures “lies primarily in the informed discretion of the administrative agency”).

⁸⁶ See Gonzales & Glen, *supra* note 66, at 857–58 (explaining that the referral authority was used sixteen times total during the eight-year George W. Bush Administration and only four times during Barack Obama’s eight years as president). Generally, Attorneys General have used the referral authority less frequently over time, although the rate of review depends on the administration. *Id.* For example, between 1942 and 1952, Attorneys General reviewed nearly thirty-seven cases per year, while Attorneys General during the George W. Bush Administration invoked the referral authority an average of two times per year. *Id.* Comparatively, the Trump Administration has used the referral authority more frequently than previous administrations, invoking it four times in 2018 alone. *Asylum Law—Attorney General’s Certification Power—Attorney General Holds That Salvadoran Woman Fleeing Domestic Violence Failed to Establish a Cognizable Particular Social Group—In re A-B-*, 271 & N. Dec. 316 (Att’y Gen. 2018), 132 HARV. L. REV. 803, 809 (2018) [hereinafter *Asylum Law—In re A-B-*].

⁸⁷ See Gonzales & Glen, *supra* note 66, at 847 (explaining that the referral authority enables the Attorney General to “effect profound changes in legal doctrine”); Trice, *supra* note 75, at 1767–68 (asserting that the use of the referral authority is almost always controversial).

⁸⁸ Trice, *supra* note 75, at 1768 (noting that regulations governing the referral authority do not require the Attorney General to provide notice of the issues to be reviewed, to give parties a chance to be heard, or to invite input from amici on issues of sweeping significance).

⁸⁹ See Gonzales & Glen, *supra* note 66, at 859 & n.106 (noting that in 64.47% of the Attorney General’s reversals of a BIA decision, the results cut against the noncitizen’s interests); Trice, *supra* note 75, at 1771 (noting that the majority of the Attorney General’s referral decisions “produce significant changes in the law that directly affect whole classes of immigrants in removal proceedings”).

⁹⁰ See Gonzales & Glen, *supra* note 66, at 861 (providing a broad thematic overview of the major types of contemporary Attorney General referral decisions). These three categories are illustrative,

erful tool to advance executive immigration policy.⁹¹ A flexible referral authority, so the argument goes, enables the Attorney General to enact policy without a burdensome rulemaking process that can extend for years without resolution.⁹² Others critique the authority for its lack of guidelines and for creating a structure in which one person can abruptly overrule the decision of a neutral, adjudicatory body.⁹³ Indeed, current legislation and regulations do not require the Attorney General to follow any uniform procedure in overturning BIA precedent.⁹⁴ The Attorney General is not required to provide minimal notice to parties or elicit input from stakeholders, including immigrant advocacy organizations and others directly affected.⁹⁵

Despite this absence of procedural requirements, former Attorneys General have voluntarily imposed restrictions on their own referral authority.⁹⁶ For example, during the Obama Administration, Attorney General Eric Holder exercised particular caution in the two instances in which he used his referral authority to overturn BIA precedent.⁹⁷ Before deciding *Matter of Silva-Trevino*

rather than exhaustive, as the Immigration and Nationality Act (INA) does not limit the Attorney General's referral authority to any type of case. *Id.* For example, Attorney General Michael Mukasey invoked his referral authority in *Matter of J-S-* to resolve a question of statutory interpretation regarding whether spouses of noncitizens whose governments had subjected them to coercive population control, including involuntary sterilization, were entitled to refugee status on that fact alone. 24 I. & N. Dec. 520, 526 (A.G. 2008); Gonzales & Glen, *supra* note 66, at 863–65. In *J-S-*, the Attorney General held that the INA's refugee definition extended only to those who had undergone such coercive population control, and not to their spouses. 24 I. & N. Dec. at 530–31.

⁹¹ See Gonzales & Glen, *supra* note 66, at 920–21 (arguing that, as head of the DOJ, the Attorney General should use the referral authority more often to efficiently and clearly advance executive policy goals); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 177 (2010) (proposing the use of the Attorney General's referral authority as one mechanism to implement policy change regarding the post-departure bar to reopening a case).

⁹² See Gonzales & Glen, *supra* note 66, at 886–89 (explaining that despite efforts by Attorneys General after the BIA's 1999 decision in *Matter of R-A-* to institute a clear rule regarding asylum eligibility for domestic violence victims, still today there is no final rule).

⁹³ See, e.g., Margaret Taylor, *Midnight Agency Adjudication*, 102 IOWA L. REV. ONLINE 18, 19 (2016), <https://ilr.law.uiowa.edu/assets/Uploads/Taylor-FinalPublication.pdf> [<https://perma.cc/RV55-DRJM>] (framing the Attorney General's referral authority as conflicting with a central tenet of the U.S. legal system, structured to ensure that neutral adjudicators decide issues); see also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1672 (2010) (objecting to Attorney General review of adjudicatory decisions while acknowledging that the referral authority is a tool to achieve policy coherence without the need for notice-and-comment rulemaking).

⁹⁴ 8 C.F.R. § 1003.1(h) (providing no concrete procedural requirements for the use of the Attorney General's referral authority); see Gonzales & Glen, *supra* note 66, at 916 (noting that if the Attorney General uses the referral authority to overturn BIA precedent, he should issue an opinion except in the case of "extraordinary countervailing considerations").

⁹⁵ See *Asylum Law—In re A-B-*, *supra* note 86, at 806–07 (noting that although Attorney General Eric Holder chose to seek input through a notice-and-comment period, Jeff Sessions did not).

⁹⁶ See, e.g., *id.* (describing the procedural protections that former Attorney General Eric Holder employed while invoking his referral authority).

⁹⁷ *Id.*

in 2015 and *Matter of Compean* in 2009, Holder either sought public input through notice-and-comment rulemaking or awaited developments in federal circuit court precedent before intervening.⁹⁸ Given that his decisions in both cases would have sweeping consequences for immigrants in removal proceedings, Holder sought diverse perspectives and a thorough consideration of the issues.⁹⁹

Like Holder, Attorneys General over the last several decades have invoked the referral authority to resolve questions of asylum eligibility and related protections.¹⁰⁰ Comparatively, Attorneys General under the Trump Administration have already used the referral authority more frequently than previous administrations, invoking it four times in 2018 alone.¹⁰¹ Given the high-stakes nature of asylum cases, these referral decisions can have sweeping and immediate effects, both positive and negative, for asylum seekers in the United States.¹⁰²

C. *The Absence of Reliable, Substantive Protections for Victims of Domestic Violence Seeking Asylum in the United States*

1. A Turbulent History of Domestic Violence Asylum Cases

In the United States, recent increases in asylum seekers have sparked contentious debate.¹⁰³ For some, these rising numbers symbolize a “flood” or “invasion” of “illegal aliens.”¹⁰⁴ For others, these individuals are “refugees” flee-

⁹⁸ *Id.* In Attorney General Holder’s 2015 decision in *Matter of Silva-Trevino*, he reversed decades-old precedent defining the term, “crime involving moral turpitude,” a conviction that makes a noncitizen inadmissible and thus ineligible for discretionary relief from deportation. 24 I. & N. Dec. 687, 688–90 (A.G. 2008). In *Matter of Compean*, Attorney General Holder vacated a decision made by former Attorney General Mukasey regarding the standard of review for motions to reopen on account of ineffective assistance of counsel in removal proceedings. 25 I. & N. Dec. 1, 1–3 (A.G. 2009).

⁹⁹ See *Asylum Law—In re A-B-*, *supra* note 86, at 807–08 (arguing that, unlike A.G. Sessions, Attorney General Holder used the referral authority to seek diverse perspectives).

¹⁰⁰ See Gonzales & Glen, *supra* note 66, at 861–68 (detailing the recent use of the Attorney General referral authority to decide issues of asylum eligibility and related protection).

¹⁰¹ *Id.* at 857; *Asylum Law—In re A-B-*, *supra* note 86, at 809.

¹⁰² See Gonzales & Glen, *supra* note 66, at 847 (noting the referral authority’s potential to effect “profound changes in legal doctrine”).

¹⁰³ See Maya Rhodan, *The Number of Asylum Seekers Has Risen by 2,000% in 10 Years. Who Should Get to Stay?*, TIME (Nov. 14, 2018), <http://time.com/longform/asylum-seekers-border/> [<https://perma.cc/Q2MB-HSHF>] (explaining that the number of asylum seekers has risen from fewer than five thousand people in 2008 to over ninety-seven thousand in 2018, and this has polarized immigration rights advocates and others who support Trump’s “policy war against asylum seekers”).

¹⁰⁴ See, e.g., Plyler v. Doe, 457 U.S. 202, 249 (1982) (Burger, C.J., dissenting) (depicting an “ever-increasing flood of illegal aliens”); U.S. DEP’T OF HOMELAND SEC., *DHS Secretary Nielsen’s Remarks on the Illegal Immigration Crisis* (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/dhs-secretary-nielsens-remarks-illegal-immigration-crisis> [<https://perma.cc/5ZJD-W4EY>] (describing a “flood of illegal immigrants, drugs, contraband, and crime coming across the border”); Newt Gingrich, *The Caravan Is an Attack on America: Stop the Caravan Now*, FOX NEWS (Oct. 19, 2018),

ing “humanitarian crises” around the world.¹⁰⁵ Indeed, this linguistic dissonance embodies a national debate about the proper balance between our interest in preserving state sovereignty and our moral obligation to help others in need.¹⁰⁶ In drawing lines between those who merit legal protection and those who do not, the United States must necessarily determine just how far its moral obligation extends.¹⁰⁷

The legal protection of asylum in the United States derives from international law.¹⁰⁸ In the wake of the horrors of World War II, many of the world’s leaders assembled in efforts to prevent the reoccurrence of the “barbarous acts which . . . outraged the conscience of mankind.”¹⁰⁹ In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights, which includes the right to seek and enjoy in other countries asylum from persecution.¹¹⁰ Soon after, in 1951, the United Nations Refugee Convention (the Convention) clarified exactly who is eligible for asylum by defining the term “refugee.”¹¹¹

<https://www.foxnews.com/opinion/newt-gingrich-the-caravan-is-an-attack-on-america-stop-the-caravan-now> [<https://perma.cc/64PM-K96Y>] (portraying the caravan of “illegal immigrants” approaching the United States to seek asylum as “an invasion of our sovereign border”).

¹⁰⁵ See, e.g., John Cohen, *Why the Trump Administration Let the Border Become a Full-Blown Humanitarian Crisis*, ABC NEWS (Dec. 15, 2018), <https://abcnews.go.com/US/trump-administration-border-full-blown-humanitarian-crisis-opinion/story?id=59797528> [<https://perma.cc/6VRC-363Y>] (reporting that 281 people had died in 2018 through the date of the article’s publication trying to cross the southern border, including 7-year-old Jakelin Caal Maquin, who died of dehydration while in U.S. Customs and Border Protection custody).

¹⁰⁶ See Daniel Kanstroom, *Loving Humanity While Accepting Real People, in* DRIVEN FROM HOME: PROTECTING THE RIGHTS OF FORCED MIGRANTS 115, 115 (David Hollenbach ed., 2010) (explaining that discourse surrounding asylum seekers has always been replete with clashes between “generous obligations to ‘mankind’ or ‘humanity’ and more restrictive concerns about certain types of people”).

¹⁰⁷ See, e.g., Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 414 (2007) (“Asylum challenges the national conscience in distinctive ways. It generates hard questions about our moral responsibilities to fellow humans in distress . . . [and] the recognition of human rights and our willingness to give them practical effect”); Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [<https://perma.cc/7RVF-TDET>] (citing *A-B-* as “the latest turn in a long-running debate over what constitutes a need for asylum”).

¹⁰⁸ See G.A. RES. 217 (III) A, Universal Declaration of Human Rights, at art. 14 (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

¹⁰⁹ *Id.* at pmb1.

¹¹⁰ *Id.* at art 14. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 143–71 (2001) (detailing the fascinating history of the Universal Declaration of Human Rights’ drafting, including Eleanor Roosevelt’s bold leadership and heated debates between countries about the specific language to be used).

¹¹¹ See OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, *CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES* 2–3 (2010), <https://www.unhcr.org/3b66c2aa10.html> [<https://perma.cc/YWF4-5EVV>] (describing the 1951 United Nations Convention relating to the Status of Refugees as “the centrepiece of international refugee protection today”).

The Convention and its accompanying 1967 Protocol define a refugee as someone who is unable or unwilling to return to his or her country of origin because of persecution or a well-founded fear of persecution on account of one of five factors: race, religion, nationality, membership in a particular social group, or political opinion.¹¹² These post-World War II measures responded to the refugee crisis at the time, and thus focused on the factors, like race and religion, that were considered the most prevalent bases for persecution during that era.¹¹³ In 1980, Congress enacted the Refugee Act, which incorporated this definition into U.S. immigration law.¹¹⁴ Thus, the protection of asylum is available to noncitizens in the United States or at the border who meet this definition of “refugee.”¹¹⁵ An applicant for asylum must also prove that either the government or a private actor that the government is unable or unwilling to control has inflicted the persecution.¹¹⁶

Given that the Refugee Act fails to specify a multitude of other factors that could lead to persecution, “membership in a particular social group” serves as a catch-all ground for asylum eligibility.¹¹⁷ To apply for asylum based on this ground, victims of gender-based violence—including domestic violence—must distill the myriad factors that may have accounted for their abuse

¹¹² *Id.* Underpinning the U.N. Refugee Convention is the notion of *non-refoulement*, providing that states should not return or expel refugees involuntarily to a place where they fear “threats to life and freedom.” *Id.* at 3. The 1967 Protocol simply got rid of the geographic limits and time restraints to asylum eligibility, as the Convention initially only extended to Europeans displaced because of World War II. Bethany Christa Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361, 364 (2012).

¹¹³ CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, *supra* note 111, at 2.

¹¹⁴ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 and 22 U.S.C.).

¹¹⁵ *Asylum in the United States*, AM. IMMIGRATION COUNCIL (May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> [https://perma.cc/36CF-5RRC]. In the United States, a grant of asylum confers a range of benefits on the asylee. Karen Musalo et al., *The Role of Mental Health Professionals in Political Asylum Processing*, 38 J. AM. ACAD. PSYCHIATRY L. 479, 480 (2010). The asylee can bring a spouse or child to the United States, is authorized to work and eligible for certain social services, and can eventually become a lawful permanent resident and then a U.S. citizen. *Id.*

¹¹⁶ Refugee Act; *Matter of Acosta*, 9 I. & N. Dec. 211, 222 (B.I.A. 1985) (clarifying that after the U.S. enactment of the Refugee Act, to fit within the Refugee Act’s definition of persecution, “harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control”).

¹¹⁷ Refugee Act; see Jessica Marsden, *Domestic Violence After Matter of L-R-*, 123 YALE L.J. ONLINE 2512, 2517 (2014), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5648&context=yjl> [https://perma.cc/4B5K-N9EJ] (explaining that the drafters of the Convention understood that a single list could not adequately exhaust all the possible reasons for persecution).

and define their particular social group.¹¹⁸ Typically, these social groups include sex or gender as just one of the many factors that provoked persecution.¹¹⁹ For a particular social group to be cognizable under U.S. asylum law, it must be defined by a shared “immutable” characteristic.¹²⁰ In the BIA’s 1985 decision in *Matter of Acosta*, it recognized for the first time that sex is an immutable characteristic.¹²¹ Since this landmark decision, subsequent asylum cases have relied on *Acosta* to propound the validity of sex as a characteristic that could serve as a basis for persecution and thus be protected under asylum law.¹²² Despite the Board’s decision in *Acosta*, courts still struggled in its wake to define “particular social group” with consistency.¹²³

In 1993, in *Fatin v. INS*, the United States Court of Appeals for the Third Circuit invoked *Acosta* and held that gender-based persecution could be asylum-worthy.¹²⁴ A few years later, in 1996, the BIA recognized a gender-defined social group in *Matter of Kasinga*.¹²⁵ The respondents in both *Fatin* and *Kasinga* were successful only after enhancing their gender-based asylum

¹¹⁸ Lobo, *supra* note 112, at 367–68. Gender-based violence can manifest in many different forms, including domestic violence, female genital mutilation, and honor killings, in which a woman who has been unfaithful is murdered to restore her family’s honor. *Id.* at 381, 396 & n.270.

¹¹⁹ *Id.* at 368. For example, in the 1996 case of *Matter of Kasinga*, the respondent formed her particular social group using not only gender, but also age, tribe membership, geographic location, and other aspects of her lived experience. 21 I. & N. at 365 (respondent claiming membership in the particular social group of young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice).

¹²⁰ *See Acosta*, 9 I. & N. Dec. at 233 (clarifying that “immutable” extends beyond its literal definition to encompass a common characteristic “that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”).

¹²¹ *Id.* (noting that “[t]he shared characteristic might be an innate one such as sex”).

¹²² *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1235, 1237–41 (3d Cir. 1993) (recognizing gendered persecution as asylum-worthy and feminism as a political opinion); *Kasinga*, 21 I. & N. at 365.

¹²³ *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575–77 (9th Cir. 1986) (noting that the *Handbook on Procedures and Criteria for Determining Refugee Status*, promulgated by the United Nations High Commissioner for Refugees, fails to define the term particular social group); *see also id.* (finding that a “class of young, working class, urban males” of military age was overbroad and not cohesive enough to constitute a particular social group); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 923 (1992) (explaining that the legislative history and current judicial and agency standards for defining the term “particular social group” are uninformative and inconsistent).

¹²⁴ *Fatin*, 12 F.3d at 1239–41. In *Fatin*, the Third Circuit considered whether “upper class Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals” constituted a particular social group. *Id.* at 1237. The BIA rejected this formulation, but the Third Circuit recognized it as a cognizable particular social group. *Id.* at 1235, 1241.

¹²⁵ *Kasinga*, 21 I. & N. at 365–66. In *Kasinga*, the asylee claimed membership in the particular social group of young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice. *Id.* The BIA held, narrowly, that this formulation constituted a cognizable particular social group. *Id.*

claims by introducing a variety of other factors besides gender.¹²⁶ After *Kasinga*, courts began consistently recognizing gender-based violence as falling within the scope of the Refugee Act and women began to see some success with their claims in immigration courts.¹²⁷

Despite this momentum, courts refused to define “women” more broadly as a particular social group.¹²⁸ Even though asylum law requires cases to be adjudicated on a case-by-case basis, adjudicators feared overextending protected grounds.¹²⁹ As a result, doctrine remained unstable and women remained vulnerable, especially because the decision to grant asylum is discretionary.¹³⁰ This instability ultimately led to the BIA’s 1999 decision in *Matter of R-A*.¹³¹ In *R-A*, the BIA overturned the immigration court’s asylum grant to Rody Alvarado and rejected her proposed social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”¹³² The BIA held that the social group was not recognized in Alvarado’s society and that her persecution resulted from “tragic personal circumstances.”¹³³ The Board’s reversal seemingly halted years of progress for gender-based asylum claims and threatened the future success of domestic violence asylum claims.¹³⁴

¹²⁶ *Fatin*, 12 F.3d at 1237 (respondent defining her particular social group using gender, socioeconomic status, political beliefs, and education level); *Kasinga*, 21 I. & N. at 365 (defining the respondent’s particular social group using gender, age, tribe membership, geographic location, and other aspects of her lived experience).

¹²⁷ Lobo, *supra* note 112, at 388 & n.219; *see, e.g.*, Dep’t of Homeland Security’s Supplemental Brief, *Matter of L-R* (B.I.A. Apr. 13, 2009) [hereinafter DHS Brief in *Matter of L-R*], https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [<https://perma.cc/5FSX-H8WJ>] (conceding that the respondent, a Mexican woman who had been in an abusive domestic relationship, could be eligible for asylum and asking the BIA to remand the matter to the Immigration Court). During the remanded proceedings, the Department of Homeland Security stipulated to an order granting asylum to the respondent. *See Matter of L-R*, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/H9X9-ARA7>].

¹²⁸ Lobo, *supra* note 112, at 368 (explaining that despite the United States’ recognition of gender-based particular social groups, it is nonetheless “reluctant to name ‘women’ without any qualifier as the particular social group”).

¹²⁹ *See id.* (describing a fear in the United States of opening “the proverbial floodgates”).

¹³⁰ 8 U.S.C. § 1158(b)(1)(a) (2012) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures”); Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 596 (2012) (explaining that the word “may” in § 208 of the INA, codified at 8 U.S.C. § 1158, has been interpreted to grant discretionary power to the deciding officer).

¹³¹ *R-A*, 22 I. & N. Dec. at 919.

¹³² *Id.* at 917.

¹³³ *Id.* at 919.

¹³⁴ Marsden, *supra* note 117, at 2529 (noting that many believed *Matter of R-A* threatened not just asylum claims based on domestic violence, but a wide range of other, gender-based asylum claims as well).

Headed by Attorney General Janet Reno, the DOJ in 2001 proposed rules to amend certain asylum eligibility recommendations, largely to reverse particular aspects of the Board's decision in *R-A*.¹³⁵ Rather than declare a categorical rule applying the Refugee Act to all domestic violence victims, Reno aimed to clarify governing asylum law and expand it to apply more generally.¹³⁶ In 2001, the acting Immigration & Naturalization Services Commissioner referred *R-A* to Reno.¹³⁷ She vacated the case and directed the BIA to stay its reconsideration until her proposed rule was fully published.¹³⁸ Reno's rule, however, was never published.¹³⁹ Ultimately, in 2008, Attorney General Michael Mukasey invoked his referral authority to reconsider Alvarado's claim in *R-A*.¹⁴⁰ Despite the lack of a final rule or precedential decision regarding asylum eligibility for domestic violence victims, Alvarado won asylum in 2009, after a decade of uncertainty.¹⁴¹

Alvarado's case captured a lingering belief in asylum law that domestic violence does not constitute a significant societal issue, and instead should remain a personal, private matter.¹⁴² Despite the vast, substantive changes in state and federal legislation to protect domestic violence victims in the United

¹³⁵ See Gonzales & Glen, *supra* note 66, at 887–88 (explaining that Attorney General Reno's rule would (1) clarify that applicants need not prove the persecutor would persecute all women in the social group to establish the nexus and (2) provide “illustrative criteria to meet in order to establish a cognizable particular social group”).

¹³⁶ *Id.* (explaining that the proposed rule clarified that asylum law does not require the applicant to prove that her persecutor would persecute all women in the particular social group in order to demonstrate the requisite nexus between the social group and the persecution). The rule also included a provision explaining that evidence of a persecutor's desire to persecute other people who share the applicant's characteristic is relevant but not required. *Id.* Finally, the rule introduced illustrative criteria that an applicant must meet to establish a particular social group. *Id.*

¹³⁷ *R-A*, 22 I. & N. Dec. at 906; Gonzales & Glen, *supra* note 66, at 888.

¹³⁸ *R-A*, 22 I. & N. Dec. at 906; Gonzales & Glen, *supra* note 66, at 888.

¹³⁹ Gonzales & Glen, *supra* note 66, at 888 (explaining that despite efforts by Attorney General Reno, the rule remains unpublished today).

¹⁴⁰ *Id.* Five years earlier, in 2003, Attorney General John Ashcroft had referred *R-A* to himself and had ultimately remanded it for the BIA to decide upon publication of the final rule. *Id.* (noting that four years after Attorney General Ashcroft's referral of the case, this rule still remained unpublished).

¹⁴¹ *Id.* at 889; see also Editorial, *Rody Alvarado's Odyssey*, N.Y. TIMES (Nov. 9, 2009), <https://www.nytimes.com/2009/11/09/opinion/09mon3.html> [<https://perma.cc/EC4W-FFZX>] (reporting Alvarado's grant of asylum after “her case took a tortuous route through immigration courts, where the question of asylum for battered women has long been muddled by controversy, indecision and inaction”). As of 2017, Alvarado also became a U.S. citizen. Joel Rose, *This Salvadoran Woman Is at the Center of the Attorney General's Asylum Crackdown*, NPR (May 22, 2018), <https://www.npr.org/2018/05/22/611920968/this-salvadoran-woman-is-at-the-center-of-the-attorney-generals-asylum-crackdown> [<https://perma.cc/3MJY-SJBD>] (reporting that Alvarado's long but victorious story has become an inspiration for women who face uncertainty with respect to their asylum claims).

¹⁴² *R-A*, 22 I. & N. Dec. at 919 (“[F]or ‘social group’ purposes, [Alvarado] has not shown that women are expected by society to be abused, or that there are any adverse societal consequences to women or their husbands if the women are not abused.”).

States, no such changes materialized in asylum law.¹⁴³ Even with the lack of firm precedent, though, victims of domestic violence continued to win asylum cases based on a combination of their gender and other factors.¹⁴⁴

In 2014, in *Matter of A-R-C-G-*, the BIA issued a landmark decision for domestic violence victims seeking asylum in the United States.¹⁴⁵ In *A-R-C-G-*, the BIA granted asylum to an applicant who claimed membership in the particular social group “married women in Guatemala who are unable to leave their relationship.”¹⁴⁶ Although its holding was narrow, the Board firmly recognized domestic violence as a basis for asylum.¹⁴⁷ For the first time, asylum law provided stable, binding precedent and a clear path for domestic violence victims.¹⁴⁸

2. *Matter of A-B-* Unsettles Recently Established Precedent

Just four years after the BIA’s decision in *A-R-C-G-*, Attorney General Jeff Sessions used his referral authority to explicitly reel back the Board’s precedent in that case.¹⁴⁹ With his 2018 decision in *A-B-*, A.G. Sessions disrupted precedent that had resulted from decades-long efforts to establish lasting, substantive protections for domestic violence victims.¹⁵⁰

In March 2018, Attorney General Sessions invoked his authority under 8 C.F.R. § 1003.1(h) to refer *A-B-* to himself for review.¹⁵¹ At that time, the respondent (Respondent)—who had fled El Salvador in 2014 after suffering years of spousal violence—had already experienced four years of uncertainty as her case proceeded through various stages of appeal.¹⁵² As the basis of her

¹⁴³ See Rabin, *supra* note 5, at 26 (noting a lack of “binding precedent or clear guidance” for domestic violence victims seeking asylum in the United States).

¹⁴⁴ See, e.g., DHS Brief in *Matter of L-R-*, *supra* note 127 (acknowledging that a Mexican woman who had been abused by her male partner could be eligible for asylum); see also Bookey, *supra* note 9, at 123–24, 130–31 (tracking domestic violence asylum case outcomes between 1994 and 2012, and noting that successful social groups combined gender, nationality, links between the applicant and a domestic relationship, and feminist opinion).

¹⁴⁵ See *A-R-C-G-*, 26 I. & N. Dec. at 388.

¹⁴⁶ *Id.* at 388–89, 393–94. The respondent in *A-R-C-G-* suffered years of abuse at the hands of her husband. *Id.* at 389. He beat her, broke her nose on one occasion, threw paint thinner on her, and raped her. *Id.*

¹⁴⁷ *Id.* at 392–95 (finding the respondent’s particular social group immutable, socially distinct, and defined with sufficient particularity).

¹⁴⁸ *Id.* at 391 (noting that the BIA in *R-A-* attempted but failed to resolve the question of whether domestic violence victims could establish membership in a particular social group).

¹⁴⁹ *A-B-*, 27 I. & N. Dec. at 316, 323 (overruling *A-R-C-G-*, “[t]hat decision was wrongly decided and should not have been issued as a precedential decision”).

¹⁵⁰ *Id.*; see Musalo, *supra* note 62, at 53–62 (detailing the development of gender-based asylum claims in the United States).

¹⁵¹ 8 C.F.R. § 1003.1(h); *A-B-*, 27 I. & N. Dec. at 323.

¹⁵² *A-B-*, 27 I. & N. Dec. at 320–23. The respondent (Respondent) in *A-B-* arrived at the United States-Mexico border in July 2014 after fleeing domestic violence in her home country. *Id.* at 320. She

asylum claim, the Respondent had alleged that she had suffered persecution on account of her membership in the particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners.¹⁵³ The Respondent’s particular social group closely mirrored that of the respondent in *A-R-C-G-*, who had been granted asylum by the BIA on the basis of her inability to leave a domestic violence relationship.¹⁵⁴

In December 2015, however, an immigration judge denied the Respondent’s asylum application, rejecting her proposed particular social group for failing to meet the criteria outlined by the Immigration and Nationality Act.¹⁵⁵ The Respondent appealed to the BIA, and in December 2016, the Board reversed the immigration judge’s decision.¹⁵⁶ In August 2017, however, the immigration judge certified the case back to the BIA, noting that several recent federal appeals court decisions had denied relief to domestic violence victims for failure to establish asylum eligibility based on membership in a particular social group.¹⁵⁷

For example, in 2017, the United States Court of Appeals for the Fourth Circuit in *Velasquez v. Sessions* held that the respondent failed to establish a nexus between the persecution she had suffered and her membership in a particular social group.¹⁵⁸ In *Velasquez*, the court characterized the violent custody

entered the United States without authorization, and U.S. Customs and Border Protection apprehended her shortly thereafter. *Id.* After entering removal proceedings, the Respondent filed an application for asylum, among other protections. *Id.* at 320–21. The Respondent also filed for “withholding of removal under the INA, 8 U.S.C. §§ 1158, 1231(b)(3), and for withholding of removal under the regulations implementing the United Nations Convention Against Torture.” *Id.*

¹⁵³ *Id.* at 321. In support of her application, the Respondent set forth facts demonstrating that her ex-husband, who shares three children with her, had “repeatedly abused her physically, emotionally, and sexually during and after their marriage.” *Id.*

¹⁵⁴ *See id.*; *A-R-C-G-*, 26 I. & N. Dec. at 388–89, 393–95 (recognizing the particular social group of “married women in Guatemala who are unable to leave their relationship”).

¹⁵⁵ *A-B-*, 27 I. & N. Dec. at 321. The immigration judge denied the Respondent’s asylum application for three additional reasons: (1) she was not credible, (2) she did not establish that her membership in a particular social group was a central reason for the persecution she experienced, and (3) she failed to meet her burden of showing that the government of El Salvador was unable or unwilling to help her. *Id.*; *see* 8 U.S.C. § 1101(a)(42)(A) (2018) (outlining the criteria for establishing a particular social group).

¹⁵⁶ *A-B-*, 27 I. & N. Dec. at 321 (citing *Matter of A-B-* (B.I.A. Dec. 8, 2016)) (finding that the respondent’s proposed particular social group was substantially similar to that of the respondent in *A-R-C-G-*, and thus the respondent in this case had satisfied the particular social group requirement). The BIA reversed and remanded the immigration judge’s denial with an order to grant asylum after completing background checks. *Id.*

¹⁵⁷ *Id.* at 321–22.

¹⁵⁸ 866 F.3d 188, 197–98 (4th Cir. 2017). In *Velasquez*, the Honduran respondent had fled intimidation and death threats from the mother of her son’s late father that had resulted from a years-long custody battle for her son. *Id.* at 191–92. The mother kidnapped Velasquez’s son several times and threatened to kill Velasquez for refusing to relinquish custody. *Id.* at 192. Further, the mother’s living son killed Velasquez’s sister, mistaking her for Velasquez, according to Velasquez’s mother. *Id.* As

battle at issue as “simply a personal dispute” and asserted that evidence demonstrating private violence does not sufficiently establish persecution.¹⁵⁹ The Fourth Circuit also noted broadly that the asylum statute was not meant to be a “panacea for the numerous personal altercations that invariably characterize economic and social relationships.”¹⁶⁰ Given the logic driving *Velasquez* and similar contemporaneous appeals court cases, the immigration judge in *A-B-* reasoned that the BIA’s 2016 decision in *A-B-* might no longer be valid law.¹⁶¹

Faced with this uncertainty, Jeff Sessions referred *A-B-* to himself for review.¹⁶² Specifically, he aimed to resolve the question of: “[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum”¹⁶³ On this issue, Attorney General Sessions invited the parties and any interested amici to submit briefs.¹⁶⁴ In his June 2018 decision, A.G. Sessions explicitly overturned *A-R-C-G-* and rejected the particular social group proposed by the Respondent in *A-B-*.¹⁶⁵

Attorney General Sessions held that the BIA in *A-R-C-G-* had failed to perform the careful analysis required by the precedential decisions establishing the framework for the particular social group analysis.¹⁶⁶ After chastising the BIA’s “cursory analysis,” A.G. Sessions applied the existing framework to the

the basis for her asylum claim, *Velasquez* claimed membership in her nuclear family as her particular social group. *Id.*

¹⁵⁹ *Id.* at 194, 196–97 (holding that respondent’s case “invokes the type of personal dispute falling outside the scope of asylum protection”).

¹⁶⁰ *Id.* at 195.

¹⁶¹ *A-B-*, 27 I. & N. Dec. at 322 (citing *Matter of A-B-*, Decision and Order of Certification, *3–4 (Immigration Ct. Aug. 18, 2017)); see, e.g., *Marikasi v. Lynch*, 840 F.3d 281, 286, 290–91 (6th Cir. 2016) (rejecting respondent’s proposed social group: “women who suffer from domestic violence in Zimbabwe at the hands of a domestic partner and are unable to leave” for failure to demonstrate immutability); *Vega-Ayala v. Lynch*, 833 F.3d 34, 39–40 (1st Cir. 2016) (rejecting respondent’s proposed social group: “Salvadoran women in intimate relationships with partners who view them as property” for failure to demonstrate immutability and social distinction).

¹⁶² *A-B-*, 27 I. & N. Dec. at 323.

¹⁶³ *Id.*

¹⁶⁴ *Id.* Although Attorney General Sessions received twelve amicus briefs, he did not cite to any of their arguments with respect to his proposed question. See generally *A-B-*, 27 I. & N. Dec. 316 (addressing just two amici concerns over the course of a thirty-one-page decision: (1) regarding due process in the certification of the case and (2) concerning a belief that Sessions is advancing policy views on immigration issues).

¹⁶⁵ See *id.* at 339–40.

¹⁶⁶ *Id.* at 340; see *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (holding that an applicant seeking asylum based on membership in a particular social group must demonstrate that their proposed social group is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question”); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 224 (B.I.A. 2014) (holding that an applicant seeking asylum based on membership in a particular social group must prove that his or her membership in that social group was a central reason for the persecution).

respondent's claim in *A-R-C-G*.¹⁶⁷ He held that: (1) her particular social group failed to establish the requisite particularity and social distinction, (2) she failed to demonstrate past persecution, and (3) she failed to establish a nexus between her social group and her persecution.¹⁶⁸ Having overruled *A-R-C-G*, Attorney General Sessions vacated the BIA's decision in *A-B*- as well.¹⁶⁹

In articulating his reasoning, A.G. Sessions drew a sharp distinction between the abstract victim of private violence and the "prototypical refugee," who flees government persecution.¹⁷⁰ He held that immigration adjudicators must take *particular* care in assessing asylum claims brought by victims of private violence alleging membership in a particular social group.¹⁷¹ Attorney General Sessions also added broadly that claims by victims of domestic violence committed by private actors will generally fail to qualify for asylum.¹⁷² Echoing the Fourth Circuit's language in *Velasquez*, A.G. Sessions proclaimed: "the asylum statute does not provide redress for all misfortune."¹⁷³

In a political climate characterized by polarizing rhetoric with respect to asylum seekers, Attorney General Sessions' dramatic pronouncement sparked significant reactions from scholars and advocates.¹⁷⁴ Many feared that A.G. Sessions' devaluation of private violence signified a return to the "dark ages"

¹⁶⁷ *A-B*-, 27 I. & N. Dec. at 331, 334–40.

¹⁶⁸ *Id.* Attorney General Sessions held that the respondent's social group was not particular because it did not "exist independently" of the harm asserted. *Id.* at 334–35. In his view, groups defined by vulnerability to private violence are too diffuse and "often come from all segments of society." *Id.* He found no evidence to support the notion that Guatemalan society views women in the respondent's particular social group as socially distinct. *Id.* at 336. A.G. Sessions then assessed the respondent's alleged persecution under a three-part test. *Id.* at 337 ("persecution" must (1) target a belief or characteristic, (2) be severe, and (3) be inflicted by the government or someone the government is unwilling or unable to control). He asserted that private criminals act more often because of "greed or vendettas" rather than any intent to target a specific group of people. *Id.* He also held that the respondent's harm was severe, but that victims of private violence must show that the government "demonstrated a complete helplessness to protect the victims" and respondent failed to do so in this case. *Id.* Finally, Attorney General Sessions held that private criminal actors may have a plethora of reasons to target people, and that the respondent did not adequately demonstrate the nexus requirement. *Id.* at 339.

¹⁶⁹ *Id.* at 340.

¹⁷⁰ *Id.* at 318. In conceiving of this abstract victim of private violence, Sessions focuses on both victims of domestic violence and gang violence. *Id.* at 320.

¹⁷¹ *Id.* at 340 ("Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims, *especially* where victims of private violence claim persecution based on membership in a particular social group.") (emphasis added).

¹⁷² *Id.* at 320.

¹⁷³ *Velasquez*, 866 F.3d at 195 ("[T]he asylum statute was not intended as a panacea for the numerous personal altercations that invariably characterize economic and social relationships."); *A-B*-, 27 I. & N. Dec. at 318.

¹⁷⁴ See, e.g., Anderson, *supra* note 64 (predicting that *A-B*- would result in the return of "significant numbers of bona fide refugees" to their persecutors); Gingrich, *supra* note 104 (describing asylum seekers as "illegal immigrants" carrying out "an invasion of our sovereign border").

or precluded asylum for domestic violence victims entirely.¹⁷⁵ Part II of this Note examines the validity of these fears and how far Sessions' decision actually extends.¹⁷⁶

II. THE IMPACT OF *MATTER OF A-B-* ON DOMESTIC VIOLENCE VICTIMS SEEKING ASYLUM IN THE UNITED STATES

On the one hand, Jeff Sessions' decision in *Matter of A-B-* did not drastically alter the framework for analyzing asylum claims brought by domestic violence victims claiming membership in a particular social group.¹⁷⁷ On the other hand, the decision marked a symbolic return to rhetoric about the private nature of domestic violence that has been increasingly suppressed and condemned since the women's movement began its work in the United States in the 1960s.¹⁷⁸ Section A of this Part explores the limits of *A-B-* in terms of its substantive, legal impact on asylum-seekers alleging persecution in the form of private violence.¹⁷⁹ Section B examines the symbolic nature of A.G. Sessions' invocation of the Attorney General referral authority to restrict the expansion of U.S. asylum protections for domestic violence victims.¹⁸⁰

A. *The Limits of Matter of A-B-*

Attorney General Sessions used his referral authority, in part, to clarify the standard required for applicants seeking asylum based on membership in a particular social group.¹⁸¹ In his decision in *A-B-*, however, A.G. Sessions merely affirmed the existing framework for adjudicating these claims, rather than establishing a new one.¹⁸² These standards arose from three precedential

¹⁷⁵ See, e.g., Benner & Dickerson, *supra* note 107 (“What this decision does is yank us all back to the Dark Ages of human rights and women’s human rights and the conceptualization of it”) (quoting Karen Musalo, a defense lawyer who worked the *R-A-* case); see also *id.* (positing that the decision “effectively closes a major avenue for asylum seekers”).

¹⁷⁶ See *infra* notes 177–220 and accompanying text.

¹⁷⁷ See *Matter of A-B-*, 27 I. & N. Dec. 316, 340 (A.G. 2018); NAT’L IMMIGRANT JUSTICE CTR., *MATTER OF A-B-*: INFORMATION AND RESOURCES (Aug. 22, 2019), <https://immigrantjustice.org/matterofab?q=matter-b-information-and-resources> [<https://perma.cc/8E5D-B2XK>] (arguing that the holding of *Matter of A-B-* itself is narrow, and that “nearly all the damaging language is dicta,” and “much of the damage done is a matter of optics, not law”).

¹⁷⁸ See, e.g., Rabin, *supra* note 5, at 7–8 (explaining how the women’s movement drove reform to reframe the issue of domestic violence as a public, rather than a private concern).

¹⁷⁹ See *infra* notes 181–200 and accompanying text.

¹⁸⁰ See *infra* notes 201–220 and accompanying text.

¹⁸¹ *A-B-*, 27 I. & N. Dec. at 323, 340. Indeed, given the ambiguity of the term, “particular social group,” courts have grappled with defining its limits since Congress enacted the Refugee Act in 1980. See, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575–77 (9th Cir. 1986) (noting that the term “particular social group” is undefined).

¹⁸² *A-B-*, 27 I. & N. Dec. at 317. For an applicant to establish membership in a particular social group, he or she must demonstrate that the group: (1) comprises members who share a common im-

BIA cases, dating back to 1985, when the Board issued its landmark decision in *Matter of Acosta* and held that members of a particular social group must share a common immutable characteristic.¹⁸³ In 2014, *Matter of M-E-V-G-* and *Matter of W-G-R-* refined the framework by introducing the requirements of particularity and social distinction and requiring applicants to demonstrate that their membership in the social group is a central reason for the persecution.¹⁸⁴ In his critique of the BIA's decision in *Matter of A-R-C-G-*, A.G. Sessions primarily took issue with the Board's failure to properly apply these standards, not with the standards themselves.¹⁸⁵ Thus, for advocates advancing asylum claims on behalf of domestic violence victims alleging membership in a particular social group, the foundational legal framework remains unchanged.¹⁸⁶

Further, although A.G. Sessions asserted that *A-R-C-G-* acknowledged an "expansive new category" of refugees fleeing private violence, this claim fails to account for existing precedent, dating back to 1985, recognizing gender-based asylum claims.¹⁸⁷ Indeed, although *A-R-C-G-* set official precedent in 2014, courts had been applying the law and granting claims based on gendered, private violence well before that case.¹⁸⁸ In his opinion in *A-B-*, Ses-

mutable characteristic, (2) is defined with particularity, and (3) is socially distinct within the society in question. *Id.* Further, the applicant must demonstrate that membership in the social group is one central reason for the persecution. *Id.*

¹⁸³ See *Matter of Acosta*, 9 I. & N. Dec. 211, 233 (B.I.A. 1985) (interpreting particular social group to mean a group of persons "all of whom share a common, immutable characteristic"); *infra* note 184 and accompanying text (describing the standards established by *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014) and *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014)).

¹⁸⁴ See *A-B-*, 27 I. & N. Dec. at 317; *M-E-V-G-*, 26 I. & N. Dec. at 237 (holding that an applicant seeking asylum based on membership in a particular social group must demonstrate that his or her proposed social group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question"); *W-G-R-*, 26 I. & N. Dec. at 224 (holding that applicants seeking asylum based on membership in a particular social group must prove that their membership in that social group was a central reason for their persecution).

¹⁸⁵ *A-B-*, 27 I. & N. Dec. at 319. In *Matter of A-R-C-G-*, the BIA did not perform the analysis required by these precedents, and instead accepted the Department of Homeland Security concessions that the respondent was a member of a qualifying social group and her membership was a central reason for her persecution. *Id.* (citing *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389, 390–95 (B.I.A. 2014)).

¹⁸⁶ See *id.* at 317 (affirming the existing framework for assessing asylum claims brought by victims of private violence based on membership in a particular social group).

¹⁸⁷ *Id.* at 319; see, e.g., *Fatin v. INS*, 12 F.3d 1233, 1237, 1241 (3d Cir. 1993) (recognizing gendered persecution as asylum-worthy and feminism as a political opinion in 1993); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365, 367 (B.I.A. 1996) (recognizing a gender-defined social group in 1996); *Acosta*, 9 I. & N. Dec. at 233 (recognizing sex as an immutable characteristic in 1985).

¹⁸⁸ See, e.g., *Kasinga*, 21 I. & N. Dec. at 365–66 (applying *Acosta* to define the boundaries of "particular social group"); Bookey, *supra* note 9, at 123–24 & n.53 (noting that between 1994 and 2012, successful social group formulations in domestic violence asylum cases included: "Ghanaian women who have been intimate with men who believe it is their right to practice force or violence on their female companions" in 1997 and "Jordanian women who espouse western values and who are

sions did not explain exactly how *A-R-C-G-* drastically expands the bounds of the particular social group category; however, his language echoed political rhetoric propounded by the Trump Administration at the time.¹⁸⁹ Indeed, A.G. Sessions' critique of *A-R-C-G-*'s broad interpretation reflects a fear that immigrants are flooding U.S. borders and bringing crime with them.¹⁹⁰ In fact, Attorney General Sessions explicitly raised the issue of gang violence in his decision in *A-B-*, even though the case itself did not concern gang violence.¹⁹¹ Analogizing victims of gang violence to victims of domestic violence, Sessions asserted that an asylum applicant alleging persecution in the form of gang violence will generally not qualify because his or her social group would likely be too diffuse.¹⁹²

In part, the fact that Attorney General Sessions chose a case regarding domestic violence to restrict the flow of asylum seekers reflects a recognition of the prevalence of domestic violence internationally.¹⁹³ Indeed, Sessions conceded at the end of his opinion that he did not mean to minimize the "harrowing experiences" of domestic violence victims worldwide.¹⁹⁴ A.G. Sessions' concern, however, that *A-R-C-G-* has opened the floodgates, is misaligned with the nature of asylum adjudication.¹⁹⁵ Asylum cases are determined

unwilling to live their lives at the mercy of their husbands, their society, and their government and/or women who are challenging the traditions of Jordanian society and government" in 1994).

¹⁸⁹ *A-B-*, 27 I. & N. Dec. at 332 (noting that *A-R-C-G-* can be read as "establishing a broad new category of cognizable particular social groups"); see, e.g., Kirk Semple & Mirian Jordan, *Migrant Caravan of Asylum Seekers Reaches U.S. Border*, N.Y. TIMES (Apr. 29, 2018), <https://www.nytimes.com/2018/04/29/world/americas/mexico-caravan-trump.html> [<https://perma.cc/5TG4-Z87E>] (reporting on President Trump's anti-immigrant politics and on Jeff Sessions' statement that the caravan of migrants approaching the United States' southern border was "a deliberate attempt to undermine our laws and overwhelm our system").

¹⁹⁰ *A-B-*, 27 I. & N. Dec. at 335. Just two months before Attorney General Sessions issued *A-B-*, President Trump tweeted about a caravan of Honduran immigrants approaching the border and condemned our "[w]eak [l]aws." Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 3, 2018, 3:49 AM), <https://twitter.com/realDonaldTrump/status/981121409807155200> [<https://perma.cc/M68B-BG6X>]; see Semple & Jordan, *supra* note 189 (reporting that President Trump tweeted in mid-April 2018 "not to let these large [c]aravans of people into our [c]ountry").

¹⁹¹ *A-B-*, 27 I. & N. Dec. at 320, 335 ("The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.").

¹⁹² *Id.* at 320, 322–23. A.G. Sessions' concern about expanding refugee eligibility echoes that of the BIA in its 1999 decision in *In re R-A-*, 22 I. & N. Dec. 906, 919–20 (B.I.A. 1999) (positing that the respondent's social group may "fit[] many other victims of spouse abuse" and expressing concern that a social group that is too broad "would virtually swallow the entire refugee definition").

¹⁹³ *A-B-*, 27 I. & N. Dec. at 344 (citing the persistence of domestic violence in both El Salvador and the United States).

¹⁹⁴ *Id.* at 346 ("In reaching these conclusions, I do not minimize the vile abuse that the respondent reported she suffered at the hands of her ex-husband.").

¹⁹⁵ *Id.* at 335 (noting that "broad swaths of society" may be vulnerable to private criminal activity like domestic violence); see *Acosta*, 19 I. & N. Dec. at 233 ("The particular kind of group characteristic that will qualify under [the particular social group formulation] remains to be determined on a case-by-case basis.").

on a case-by-case basis, with judges taking into account the particular facts and circumstances individually, rather than simply categorically.¹⁹⁶ Thus, *A-B* cannot be interpreted as a categorical denial of domestic violence claims.¹⁹⁷ Adjudicators will continue to apply the existing framework, to recognize gender-based claims, and to assess cases on an individual basis.¹⁹⁸ *A-B* has not altered the substantive, legal framework for adjudicating asylum claims based on domestic violence.¹⁹⁹ In a political climate becoming increasingly hostile to immigrants, however, the decision may well give judges license to reduce their exercise of favorable discretion with respect to this type of claim.²⁰⁰

B. *The Dangers of Matter of A-B*

Although Attorney General Sessions' decision in *A-B* did not change the legal framework for adjudicating domestic violence asylum claims, the introduction of a heightened standard for domestic violence victims signaled to adjudicators to deny these claims except in cases of severe violence.²⁰¹ *A-B*'s new standard undermined the case-by-case nature of asylum adjudication and reintroduced the debate about the extent of the state's role in protecting victims of private violence.²⁰² For most of U.S. history, courts, law enforcement, and Congress either ignored or minimized the impact of domestic violence on women.²⁰³ Putting privacy on a pedestal, courts drew boundaries with regard to

¹⁹⁶ *Acosta*, 19 I. & N. Dec. at 233.

¹⁹⁷ *See A-B*, 27 I. & N. Dec. at 320 (“I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group . . .”).

¹⁹⁸ *Id.* at 317.

¹⁹⁹ *Id.* at 318–19 (affirming the analytical framework developed through precedent such as *Acosta*, *M-E-V-G*, and *W-G-R*).

²⁰⁰ *See, e.g.*, Benner & Dickerson, *supra* note 107 (expressing concern that *A-B* may result in the closing of a major avenue for domestic violence victims seeking asylum); Masha Gessen, *How the Media Normalizes Trump's Anti-Immigrant Rhetoric*, NEW YORKER (Oct. 25, 2018), <https://www.newyorker.com/news/our-columnists/how-the-mainstream-media-normalizes-trumps-anti-immigrant-rhetoric> [<https://perma.cc/F96S-3V62>] (reporting that President Trump's rhetoric with respect to the large group of central American immigrants approaching the southern U.S. border includes descriptions such as: “criminal aliens,” a “national emergency” and compromising the “safety of every single American”).

²⁰¹ *See A-B*, 27 I. & N. Dec. at 320, 337 (asserting that generally, victims of domestic violence will not qualify for asylum). The year 2018 also saw a significant increase in asylum denials across the board, increasing from 42% in 2012 to 65% in 2018. *Asylum Decisions and Denials Jump in 2018*, TRAC IMMIGRATION (Nov. 29, 2018), <https://trac.syr.edu/immigration/reports/539/> [<https://perma.cc/X6CT-CL7C>].

²⁰² *See A-B*, 27 I. & N. Dec. at 336 (“[T]here is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.”).

²⁰³ *See, e.g.*, Marcus, *supra* note 30, at 19–21 (explaining that the coverture doctrine and the “rule of thumb” served to normalize violence against women in the home and to reinforce patriarchal family

state intervention and reinforced the notion of separate spheres.²⁰⁴ These boundaries supported the subjugation of women and enabled battering and other violence without consequence.²⁰⁵ With his decision in *A-B-*, Sessions, too, draws a distinct boundary.²⁰⁶ *A-B-* asserts that U.S. asylum protection might be available to victims of private violence, but only in the most extreme cases.²⁰⁷ This heightened standard—which A.G. Sessions does not extend to the other grounds of asylum like race and religion—relies on the notion that the state’s role in cases of domestic violence is generally distant—unless, perhaps, that violence is *particularly* egregious.²⁰⁸

A.G. Sessions also elaborated on the requirement that applicants for asylum based on private violence establish a nexus between the particular social group and the persecution.²⁰⁹ In the process, Sessions downplayed the systemic nature of domestic violence, which the women’s movement fought diligently to expose and which VAWA formally recognized in 1994.²¹⁰ Sessions asserted that private violence based on a “personal relationship” or “personal disputes” may fail to establish the requisite nexus.²¹¹ To support this claim, A.G. Sessions cited *Matter of R-A-*, the BIA’s 1999 case that Attorney General Janet Reno vacated in 2001 after the decision incurred widespread criticism.²¹² In contrast to Reno, Sessions invoked his referral authority to reel back protections, rather

dynamics); *see also* *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (depicting domestic violence as a local, rather than a national concern).

²⁰⁴ *See* *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (describing marital bedrooms as “sacred precincts”).

²⁰⁵ *See* *Williams*, *supra* note 5, at 154 (explaining that the Supreme Court did not seriously begin to undermine the separate spheres ideology until the 1970s).

²⁰⁶ *A-B-*, 27 I. & N. Dec. at 337 (“[T]he level of harm must be ‘severe.’”).

²⁰⁷ *See id.* at 320 (“I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group . . .”).

²⁰⁸ *See* *Siegel*, *supra* note 30, at 2118 (noting that the common law principle of chastisement granted husbands the right to discipline their wives as long as they did not permanently injure them).

²⁰⁹ *A-B-*, 27 I. & N. Dec. at 338–39.

²¹⁰ Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40,001-40,003, 108 Stat. 1796, 1902–55 (codified as amended in scattered sections of 8, 16, 18, and 42 U.S.C.); *A-B-*, 27 I. & N. Dec. at 339 (positing that individual perpetrators of domestic violence may have any number of particular reasons for attacking their victims).

²¹¹ *A-B-*, 27 I. & N. Dec. at 339.

²¹² *See id.* (citing *In re R-A-*, 22 I. & N. Dec. 906, 921 (A.G. 2001)) (supporting the proposition that the attacker of the respondent in *A-R-C-G-* may have attacked her simply because of his “preexisting personal relationship” with her rather than because she was a member of a protected particular social group); *R-A-*, 22 I. & N. Dec. at 916; CTR. FOR GENDER & REFUGEE STUDIES, DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS PRACTICE ADVISORY 4 (Sept. 12, 2014), https://cgrs.uchastings.edu/sites/default/files/DV_Advisory_9-12-2014_FINAL_1.pdf [<https://perma.cc/Z4XM-XHZP>] (reporting that the Board’s decision in *R-A-* “provoked a firestorm of criticism”).

than enforce them.²¹³ This decision endangered countless immigrant women seeking asylum based on domestic violence.²¹⁴

The United States has recognized the unique vulnerabilities facing immigrant women who have been victims of abuse at the hands of their partners.²¹⁵ Through its extension of VAWA in 2000 to immigrants, the United States formally expressed a commitment to protecting victims of violence within its borders, despite their immigration status.²¹⁶ With *A-B-*, in contrast, Attorney General Sessions makes clear as the head of the DOJ that the United States is unwilling to extend these protections to help those who face persecution outside our borders.²¹⁷ By minimizing the impact of domestic violence and once again classifying the problem as “private,” *A-B-* symbolically captures an unwillingness on the part of the United States to combat rights violations that affect mostly women.²¹⁸

The decision in *A-B-* was possible because of a lack of statutory protections for a vulnerable population and because of an absence of restrictions on the Attorney General’s referral authority.²¹⁹ Part III of this Note imagines a structure in which the U.S. Attorney General cannot so cavalierly legislate issues with vast repercussions for broad classes of vulnerable people.²²⁰

III. A CALL TO CONGRESS

The widespread anger captured by the 2018 Year of the Woman demands reflection.²²¹ Those in power, across all fields, should examine how the structures in which they operate promote the suppression of women’s voices.²²² Indeed, as Oprah explained at the 2018 Golden Globes, the oppression of women

²¹³ See *A-B-*, 27 I. & N. Dec. at 323, 339–40.

²¹⁴ See Benner & Dickerson, *supra* note 107 (expressing concern that *A-B-* may result in the closing of a major avenue for domestic violence victims seeking asylum).

²¹⁵ See Orloff & Kaguyutan, *supra* note 43, at 108–11, 113 (depicting VAWA as a means through which to restore power to victims of abuse at the hands of their partners).

²¹⁶ Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, 114 Stat. 1491; see Biden, *supra* note 7 (characterizing VAWA as a recognition of the basic right of women in America to “be free from violence and free from fear”).

²¹⁷ *A-B-*, 27 I. & N. Dec. at 320 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

²¹⁸ See *id.*; MERRY, *supra* note 37, at 77 (describing how in the early 1990s, a transnational movement formed to promote the idea that violence against women was a human rights violation under international law).

²¹⁹ See *A-B-*, 27 I. & N. Dec. at 323 (“[T]he extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique.”); MCKINNON, *supra* note 20, at 4 (explaining that asylum law does not recognize gender as an established identity category upon which persecution can be based).

²²⁰ See *infra* notes 221–269 and accompanying text.

²²¹ See Salam, *supra* note 26 (explaining that the 2018 Year of the Woman fueled “uprisings around the world” from women like Christine Blasey Ford who “pushed fear aside to be heard”).

²²² See *id.*

“transcends any culture, geography, race, religion, politics, or workplace.”²²³ U.S. asylum law should embrace reflection in the wake of the #MeToo movement and the 2018 Women’s March and refuse to remain complacent in the face of countless women seeking justice and safety after years of abuse.²²⁴

Matter of A-B- reveals an enormous structural flaw in U.S. asylum law.²²⁵ Currently, the U.S. asylum system endows one powerful, and traditionally male, executive with the ability to endanger the lives of countless victims without consequence and without input from those impacted.²²⁶ Further, it allows this individual to speak improperly for the United States and to endorse an outdated conception of domestic violence as a private concern largely immune from state intervention.²²⁷ Given the current absence of lasting substantive protections for domestic violence victims seeking asylum, Congress should limit the Attorney General’s referral authority.²²⁸

Scholars, of course, have noted the benefits of an unrestricted Attorney General referral authority.²²⁹ In 2016, former Attorney General Alberto Gonzales and Senior Counsel for the Office of Immigration Litigation Patrick Glen wrote an article lauding the authority and advocating for its more frequent

²²³ Winfrey, *supra* note 27.

²²⁴ See Prasad, *supra* note 26, at 2510–11 (detailing the evolution and rapid expansion of the global #MeToo movement, which began in late 2017 in response to news about Harvey Weinstein’s decades-long abusive behavior toward women and the secret settlements that urged them to keep quiet); *Women’s March 2018*, *supra* note 26 (reporting on the 2018 Women’s March).

²²⁵ See generally *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

²²⁶ 8 C.F.R. § 1003.1(h)(1)(i) (2018) (outlining the Attorney General’s referral authority and providing no concrete limits aside from who can refer cases). Although there have been two female Attorneys General, men have predominantly occupied this position: eighty-three of the eighty-five U.S. Attorneys General have been male. *Supra* note 10 and accompanying text.

²²⁷ *A-B-*, 27 I. & N. Dec. at 320 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”); *supra* note 5 and accompanying text (describing the historical notion that domestic violence is a private concern and the shift in the United States from such a conception to the belief that the state has a meaningful role in protecting victims of domestic violence).

²²⁸ See, e.g., Twibell, *supra* note 8, at 198 (explaining that U.S. asylum law fails to provide a systematic recognition of gender-related claims, such as claims of persecution in the form of domestic violence). Although this Note focuses primarily on increasing procedural protections to counterbalance a lack of substantive protections, that is certainly not to say that lawmakers and advocates should ignore the dearth of substantive protections in place for domestic violence asylum seekers. See Lobo, *supra* note 112, at 368. Indeed, Congress should continue to explore increasing substantive protections, perhaps—as scholars have argued—by adding gender itself to the list of protected grounds or recognizing that “women” comprise a particular social group. See *id.*; Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L.J. 281, 290 (2002).

²²⁹ See Gonzales & Glen, *supra* note 66, at 847, 920 (describing the Attorney General referral authority as a powerful mechanism through which the executive branch can advance immigration reform, especially with a divided Congress).

use.²³⁰ The pair of DOJ veterans even concluded their lengthy article on a wistful note, leaving the reader to ponder the future of the referral authority: “[a]ll that is to be seen is whether its promise is fulfilled in the coming years.”²³¹ We cannot be sure whether this article, specifically, emboldened Attorney General Sessions to refer *A-B-* to himself; however, Gonzales and Glen do make a compelling case.²³²

As they argue, the referral authority has historically aided in clarifying and advancing immigration policy through the executive branch.²³³ Where rulemaking can extend for years without resolution, Attorney General review is swift and decisive.²³⁴ Although the referral authority has more often produced unfavorable decision for noncitizens, it can also be used for good.²³⁵ In 2001, for example, this authority enabled Attorney General Reno to vacate the BIA’s denial in *Matter of R-A-*, a case that many viewed with repulsion given the horrific abuse suffered by the respondent.²³⁶ Undoubtedly, immigrant rights advocates considered this vacatur and the respondent’s ultimate asylum grant a victory for domestic violence victims.²³⁷ Much has changed, however, in the nearly two decades since Attorney General Reno’s decision.²³⁸ In 2018, the risks of an unrestrained referral authority—most notably its potential for abuse—outweigh the rewards where human rights are at issue.²³⁹

²³⁰ See generally *id.* (providing a history of the referral authority’s use by former Attorneys General and addressing criticisms leveled at the authority itself).

²³¹ *Id.* at 921.

²³² See *id.* at 920 (noting that comprehensive legislative immigration reform seems unlikely, and the referral authority could be an effective mechanism through which to advance immigration reform).

²³³ See *id.* at 897 (arguing that Attorneys General have used the referral authority to create analytical frameworks and provide “clear, cogent, and definitive legal or policy prescription for immigration officials”). But see Taylor, *supra* note 93, at 35 (arguing that invocations of the referral authority, especially during presidential transitions, can lead to a “chaotic development of law and policy across presidential administrations”).

²³⁴ See Gonzales & Glen, *supra* note 66, at 898 (noting that Attorney General review is more certain and efficient than regulatory reform).

²³⁵ See *id.* (explaining that, “in theory the Attorney General should act in a neutral manner to advance the legal interpretation or policy prescription he deems appropriate, given all relevant factors”). But see Shah, *supra* note 78, at 138 (noting that it is in the minority of instances in which the Attorney General has used the referral authority to promote the interests of noncitizens).

²³⁶ Gonzales & Glen, *supra* note 66, at 888–90.

²³⁷ See CTR. FOR GENDER & REFUGEE STUDIES, *Matter of R-A-*, <https://cgrs.uchastings.edu/our-work/matter-r-a-> [<https://perma.cc/68HU-H5FD>] (explaining that Rody Alvarado’s grant of asylum “opened doors for other women, despite the absence of legal norms and regulations in this area of asylum law”).

²³⁸ See, e.g., Francis Wilkinson, *Why Trump Departs Fewer Immigrants Than Obama*, BLOOMBERG (May 15, 2018), <https://www.bloomberg.com/opinion/articles/2018-05-15/trump-is-deporting-fewer-immigrants-than-obama-did> [<https://perma.cc/UZ5Q-7N7V>] (reporting that President Obama’s administration strongly enforced immigration law, earning Obama the nickname “deporter in chief,” and that President Trump has employed scare tactics and broader discretion in targeting immigrants).

²³⁹ See Taylor, *supra* note 93, at 35 (describing Attorney General review during presidential transitions as a “duck, bob, and weave” route to developing and entrenching policy before ceding power).

Although many presidential administrations have aimed to curb immigration through executive branch authority, perhaps none has been as brazen and polarizing as the Trump Administration.²⁴⁰ Indeed, as a candidate, Donald Trump ran on an anti-immigrant platform, casting immigrants as “rapists” and “bad hombres.”²⁴¹ Just one week after his inauguration in January 2017, President Trump issued an executive order banning citizens of seven countries from entering the United States regardless of their visa statuses.²⁴² More recently, Trump’s demands for funding to build a wall between the United States and Mexico led to the longest government shutdown in U.S. history.²⁴³ These bold uses of executive power have highlighted the danger of a lack of restrictions on executive authority, especially in the realm of immigration, where executive decisions can yield far-reaching and devastating consequences.²⁴⁴

²⁴⁰ See, e.g., David A. Graham, *Are Children Being Kept in ‘Cages’ at the Border?*, THE ATLANTIC (June 18, 2018), <https://www.theatlantic.com/politics/archive/2018/06/ceci-nest-pas-une-cage/563072/> [<https://perma.cc/6DN8-QLKT>] (reporting that hundreds of immigrant children along the southern border are being detained in metal chain-link pens as they await processing).

²⁴¹ Jon Lee Anderson, *How Mexico Deals with Trump*, NEW YORKER (Oct. 9, 2017), <https://www.newyorker.com/magazine/2017/10/09/mexico-in-the-age-of-trump> [<https://perma.cc/9PVM-PMGT>] (detailing Donald Trump’s depictions in campaign events of Mexicans as rapists, criminals, and “bad hombres”).

²⁴² *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018). The first manifestation of President Trump’s Executive Order barred the entry of foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for ninety days. *Id.* As this “Travel Ban” adopted a variety of subsequent forms, several federal district courts entered preliminary injunctions preventing enforcement of the “Travel Ban” and the United States Court of Appeals for the Ninth Circuit affirmed one district court’s injunctions. *Id.* at 2404–07. The Supreme Court granted certiorari to resolve several questions, including the extent of the president’s authority to issue the “Travel Ban.” *Id.* at 2407–08. The Court held that the most recent iteration of the “Travel Ban” did not violate the president’s authority under the INA or the Establishment Clause. *Id.* at 2403, 2408, 2420–21. In a vigorous dissent, Justice Sotomayor likened this case to *Korematsu v. United States*, 323 U.S. 214 (1944), because of the majority’s support of the “Travel Ban” despite strong evidence of impermissible, sweeping racial animus. *Id.* at 2447 (Sotomayor, J., dissenting) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting)) (referencing the Court’s approval in *Korematsu* of “odious, gravely injurious racial classification”).

²⁴³ Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here’s the History.*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> [<https://perma.cc/M32U-7CRX>] (reporting that the government shutdown starting on December 22, 2018 lasted thirty-four days, far exceeding the second longest government shutdown in history, which occurred during Clinton’s presidency and lasted twenty-one days).

²⁴⁴ See Jayashri Srikantiah & Shirin Sinar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200 (2019), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf> [<https://perma.cc/U9D2-XDTL>] (explaining that the policies proposed by the Trump Administration “represent the most wide-ranging Executive Branch attempt to restrict immigration policies in generations”); Emily Bazelon, *How Do We Contend with Trump’s Defiance of ‘Norms’?*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html> [<https://perma.cc/7KST-WKE6>] (“Trump’s flouting of norms was the siren song of his candidacy, and it has become a defining feature of his presidency.”); Peter H. Schuck, *The Court Ruled Correctly on the Travel Ban*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/opinion/the-court-ruled-correctly-on-the>

In response, immigrant rights advocates and others across the United States have become more vocal with respect to their views on immigration.²⁴⁵ As with the women's movement in the 1960s and 1970s, activists are expressing outrage at our current system and demanding change.²⁴⁶ In effect, they are asking to have a voice in the process of deciding who belongs in the United States.²⁴⁷ By imposing procedural constraints on the exercise of the Attorney General's referral authority, Congress would create a more participatory process that reflects a greater number of voices.²⁴⁸

Given the current, complete lack of constraints on the Attorney General's referral authority, Congress could enact reform in a variety of ways.²⁴⁹ As a basic measure, it could introduce a set of standards for the use of the authority.²⁵⁰ For example, Congress could require the Attorney General to provide notice to the parties of intent to refer a case, notice upon actual referral, and a clarification of the actual issues to be resolved through referral.²⁵¹ This basic requirement of notice would enhance the transparency of these proceedings

travel-ban.html?action=click&module=inline&pgtype=Article [https://perma.cc/M9CS-FZBH] (describing the INA statute authorizing President Trump to issue the "Travel Ban" as "breathhtakingly broad"); see also Benner & Dickerson, *supra* note 107 (expressing concern that A-B- may result in the closing of a major avenue for domestic violence victims seeking asylum); Ron Nixon, *Migrant Girl's 'Horrific, Tragic' Death Is Not Its Responsibility, White House Says*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/politics/migrant-girl-dead-border-patrol.html> [https://perma.cc/4SD7-UYZG] (reporting on the death of a seven-year-old Guatemalan girl named Jakelin Caal Maquin, who died in the midst of overwhelming criticism of the Trump Administration's zero tolerance policy, which separated migrant children from their parents at the border).

²⁴⁵ See, e.g., Dakin Andone, *Coast-to-Coast Protests Denounce Trump Immigration Policies*, CNN (June 30, 2018), <https://www.cnn.com/2018/06/30/us/june-30-immigration-protests/index.html> [https://perma.cc/J7EY-YEWM] (reporting that hundreds of marches and rallies occurred throughout the United States to protest family detentions and separations).

²⁴⁶ See *id.* (reporting that protesters carried signs at immigrant rights rallies, some proclaiming "[w]e are all immigrants" and "[l]et our children dream [and] [l]et them go!"); see also Rabin, *supra* note 5, at 7–8 (explaining that advocacy from the battered women's movement in the 1960s and 1970s revealed the flaws in a legal system that conceived of domestic violence as a private concern and demanded change).

²⁴⁷ See Andone, *supra* note 245 (detailing one protester's beliefs about President Trump's child separation policy: "Trump's policy is cruelty personified and we [all] need to speak out against it").

²⁴⁸ See *Asylum Law—In re A-B-*, *supra* note 86, at 807–08 (explaining that under President Obama, Attorney General Eric Holder used his referral authority to gain diverse perspectives on legal issues, soliciting input through a notice-and-comment period or waiting for circuit courts to develop precedent so that a neutral, adjudicatory body, rather than an individual executive, could resolve the issue).

²⁴⁹ 8 C.F.R. § 1003.1(h) (providing no concrete limits on the Attorney General's referral authority aside from who can refer cases).

²⁵⁰ See Shah, *supra* note 78, at 139 (detailing the benefits of standardizing norms with respect to the Attorney General's referral authority by creating uniform procedures governing its use).

²⁵¹ See Trice, *supra* note 75, at 1797–98 (proposing that the Attorney General adopt procedures requiring notice to the parties and the opportunity to request oral argument and submit briefing).

and promote political accountability.²⁵² Congress could also establish a consistent role for the attorneys involved and enable interested parties to submit briefing and comments.²⁵³ This comments process would help ensure the Attorney General is fully informed before issuing a decision, as in *A-B-*, with repercussions for a broad class of people.²⁵⁴ A notice-and-comment requirement for the use of the referral authority would decrease the striking ease with which the Attorney General can reverse precedent without input from the people impacted.²⁵⁵

To be sure, as advocates of the Attorney General's referral authority, former Attorney General Alberto Gonzales and Patrick Glen respond to the idea of introducing procedural safeguards.²⁵⁶ They posit that suggestions to increase procedure "are premised mostly on superficial gains in the optics of referral."²⁵⁷ Even momentarily conceding this point, optics are vitally important in asylum law.²⁵⁸ When the United States extends or withdraws protections for asylum seekers, it makes a statement about what kind of country it wants to be.²⁵⁹ The Attorney General's ability to both reel back and grant rights to asylum seekers without restraint clashes with America's commitment to democracy.²⁶⁰ Gonzales and Glen also note that arguments in favor of greater procedure arise only when a decision is reached that is contrary to the interests of noncit-

²⁵² See Shah, *supra* note 78, at 132 (explaining that, although the Attorney General is a political appointee, his decisions are less constrained by political pressure and public visibility than the President's decisions).

²⁵³ See *id.* at 139 (positing that one mechanism to increase procedural safeguards on the Attorney General would be to devise a consistent, participatory role for the asylum applicant's counsel).

²⁵⁴ See *A-B-*, 27 I. & N. Dec. at 323; Trice, *supra* note 75, at 1779–80 (explaining that, without procedural restrictions on the Attorney General's use of the referral authority, he can issue a "rule by fiat, with no input from those directly affected or from those concerned with the broader effects on the thousands of immigrants likely to be bound by the decision"). Indeed, one of the recognized advantages of notice-and-comment rulemaking is broader participation that enables efficient gathering of information to aid the agency in making its decision. LUBBERS, *supra* note 79, at 123–24.

²⁵⁵ See Taylor, *supra* note 93, at 21 (distinguishing adjudication and rulemaking by the relative ease with which precedent can be overturned and by the presence of procedures that offer opportunities for participation).

²⁵⁶ See Gonzales & Glen, *supra* note 66, at 908 (responding to critics' focus on the value added by introducing greater procedural safeguards).

²⁵⁷ *Id.*

²⁵⁸ See, e.g., Rhodan, *supra* note 103 ("The political drama [surrounding asylum seekers] has fueled a deeper, more unsettling debate that gets to the heart of what kind of a country America wants to be.").

²⁵⁹ See *id.* (explaining that beneath heated debates about asylum seekers lies the fundamental question: "[t]o whom should America give asylum, and how can we humanely and responsibly grant it to them, while denying it to others?").

²⁶⁰ 8 C.F.R. § 1003.1(h) (providing no concrete limits on the Attorney General's referral authority aside from who can refer cases); see Taylor, *supra* note 93, at 19 (arguing that the Attorney General referral authority conflicts with a central tenet of the U.S. legal system, which is structured to ensure that neutral adjudicators decide issues).

izens.²⁶¹ Indeed, this unsurprising response reflects an aversion to the idea of a branch of our government exceeding its authority to reel back individual rights.²⁶²

To promote the fair and democratic use of the Attorney General's referral authority, Congress should introduce uniform procedural safeguards.²⁶³ Greater procedural protections, including a required notice-and-comment period, would promote a participatory process and curb the Attorney General's dangerous ability to overturn precedent resulting from hard-fought community efforts.²⁶⁴ The Attorney General's decision in *A-B-* does not reflect community consensus.²⁶⁵ Advocates have responded fervently, already challenging the constitutionality of the decision.²⁶⁶ In the meantime, countless domestic violence victims have been exposed to great risk.²⁶⁷ Where gender-related rights within the United States are increasingly at risk, inaction could lead to the continued chipping away of rights and the restoration of the notion of domestic violence as "private."²⁶⁸ Congress should impose greater procedural protections, including a required notice-and-comment period, to prevent our Attorney General from issuing the next *A-B-*.²⁶⁹

²⁶¹ See Gonzales & Glen, *supra* note 66, at 912 (noting that arguments in favor of greater procedural protections emanate primarily from those who represent the interests of noncitizens, including both academics and organizations).

²⁶² See, e.g., Julie Beck, *The Tricky Psychology of Holding Government Accountable*, THE ATLANTIC (Jan. 12, 2017), <https://www.theatlantic.com/science/archive/2017/01/government-accountability-psychology/512888/> [<https://perma.cc/WLD2-ALTE>] (explaining that the structure of the U.S. government provides checks and balances on the executive branch in the form of Congress and the judiciary).

²⁶³ See Shah, *supra* note 78, at 139 (proposing standardized procedural protections to curb the Attorney General's referral authority).

²⁶⁴ See Daniel M. Kowalski, *Statement in Response to Sessions' Decision in Matter of A-B- by Retired Immigration Judges and Former Members of the Board of Immigration Appeals*, LEXIS LEGAL NEWS ROOM (June 12 2018), <https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/statement-in-response-to-session-s-decision-in-matter-of-a-b-by-retired-immigration-judges-and-former-members-of-the-board-of-immigration-appeals> [<https://perma.cc/5FJT-MQXX>] ("For reasons understood only by himself, the Attorney General today erased an important legal development that was universally agreed to be correct.").

²⁶⁵ *Id.*

²⁶⁶ See *Grace v. Sessions*, No. 18-CV-1853 (EGS), 2018 WL 3812445 (D.D.C. Aug. 9, 2018) (challenging the constitutionality of *A-B-* on several grounds).

²⁶⁷ Benner & Dickerson, *supra* note 107 (expressing fear that Attorney General Sessions' decision in *A-B-* "effectively closes a major avenue for asylum seekers").

²⁶⁸ See, e.g., Andrew Cuomo, *Trump's Assault on Abortion Rights Must Be Rejected*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/opinion/cuomo-roe-abortion-trump.html> [<https://perma.cc/4HQR-W9T5>] (detailing, as part of its "attack on women's rights," efforts by the Trump Administration to end legal abortion in the United States); *supra* note 5 and accompanying text (describing the historical notion that domestic violence is a private concern).

²⁶⁹ See, e.g., Shah, *supra* note 78, at 139 (proposing the required participation of stakeholders to restrict the scope of the Attorney General's referral authority).

CONCLUSION

U.S. asylum law has failed to extend lasting, substantive protections to victims of domestic violence seeking refuge. In contrast, the United States has expressed a commitment to treating the issue of domestic violence within its borders as a serious, public concern and erasing the notion that violence in the home is a private issue. In his 2018 decision in *Matter of A-B-*, Jeff Sessions invoked his referral authority to assert that the U.S. government will extend protections to victims of domestic violence only in the most severe cases. With his decision, A.G. Sessions validates the notion, which ought to be overcome by 2018, that domestic violence is a private concern. The decision reveals the structural danger in a system that lacks substantive protections and extends broad discretion to the Attorney General through the referral authority. This current structure should not stand and would benefit greatly from greater procedural restrictions. A required notice-and-comment period would help protect otherwise vulnerable women seeking asylum and promote a democratic system for asylum adjudication.

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